133-380

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~499~~ 126

GUSTAVUS C. HOPKINS, CHARLES D. MILLER, AND LUCIUS HOPKINS SMITH, COMPOSING THE FIRM OF HOPKINS, DWIGHT & CO., SUCCESSORS OF LUCIUS HOPKINS AND AMOS T. DWIGHT, COMPOSING THE FIRM OF HOPKINS, DWIGHT & CO. AND LUCIUS H. SMITH, TRUSTEE, &c., PLAINTIFFS IN ERROR,

vs.

JOHN J. McLURE, ADMINISTRATOR OF GEORGE W. MELTON, DECEASED; W. H. KERR, CLERK OF THE COURT OF COMMON PLEAS OF FAIRFIELD COUNTY, S. C., ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED OCTOBER 6, 1886.

1 & 2 STATE OF SOUTH CAROLINA:

In the Supreme Court.

JOHN J. McLURE, as Administrator of the Estate of George W. Melton, Deceased, Respondent,

vs.

MARGARET A. MELTON and Her Infant Children, Appellants, and Others, the Creditors of said George W. Melton, Deceased, of Whom the Successors of Hopkins, Dwight & Co. and W. H. Kerr, as Clerk of Court for Fairfield County, are Appellants and all Others Respondents.

To the honorable the chief justice of the supreme court of the State of South Carolina:

The petition of Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith, the successors of Hopkins, Dwight & Co., and of Lucius H. Smith, as trustee of Hopkins, Dwight & Co. and of Mrs. Margaret A. Melton and her children, respectfully showeth—

That the above-entitled action was recently tried in this court, the facts in which cause appear in the "case" thereof, hereto annexed.

That a decree in said cause has recently been rendered in the highest court in this State in which a decision can be had.

That said decree is a final decree.

3 That in said cause was drawn in question the validity of a statute of said State and of a decision of the court of last resort of the said State on the ground of their being repugnant to

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JUDD & DETWEILER, PRINTERS, WASHINGTON, APRIL 2, 1889.

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1 & 2 STATE OF SOUTH CAROLINA:

In the Supreme Court.

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vs.

MARGARET A. MELTON and Her Infant Children, Appellants, and Others, the Creditors of said George W. Melton, Deceased, of Whom the Successors of Hopkins, Dwight & Co. and W. H. Kerr, as Clerk of Court for Fairfield County, are Appellants and all Others Respondents.

To the honorable the chief justice of the supreme court of the State of South Carolina:

The petition of Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith, the successors of Hopkins, Dwight & Co., and of Lucius H. Smith, as trustee of Hopkins, Dwight & Co. and of Mrs. Margaret A. Melton and her children, respectfully showeth—

That the above-entitled action was recently tried in this court, the facts in which cause appear in the "case" thereof, hereto annexed.

That a decree in said cause has recently been rendered in the highest court in this State in which a decision can be had.

That said decree is a final decree.

3 That in said cause was drawn in question the validity of a statute of said State and of a decision of the court of last resort of the said State on the ground of their being repugnant to the Constitution of the United States.

That the decision of such court of last resort was adverse to the right and title claimed by your petitioners, as appears of record.

Wherefore your petitioners pray that their writ of error to the Supreme Court of the United States and a citation to the defendants in error may be allowed and their supersedeas bond may be approved.

And your petitioners will ever pray, and so forth.

JAS. H. RION,
Their Attorney and Solicitor.

Filed May 27th, 1886.

ALBERT M. BOOZEE,
Clerk of Supreme Court of South Carolina.

[Endorsed:] The State of South Carolina. In the supreme court. John J. McLure, as adm'r of the estate of George W. Melton, dec'd, *vs.* Margaret A. Melton *et al.* Petition. (Copy.)

4 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the justices of the supreme court of the State of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of South Carolina, before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John J. McLure, as administrator of the estate of George W. Melton, deceased, as plaintiff, and Margaret A. Melton and her infant children and others, the creditors of said George W. Melton, deceased, to wit, Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith, composing the firm of Hopkins, Dwight & Co., as successors of Lucius Hopkins and Amos T. Dwight, composing the late firm of Hopkins, Dwight & Co.; Lucius H. Smith, as trustee of Hopkins, Dwight & Co. and of Margaret A. Melton and her infant children; William H. Kerr, as clerk of the court of common pleas for Fairfield county, of said State; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of Juliet A. Wylie, deceased; Samuel D. Melton, G. R. Ratchford & Co., The National Bank of Chester, South Carolina, R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, Bechmon Stove Company, Russell & Alger, Armstrong, Cator & Co., B. R. Smith & Co., Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, R. C. M. Alexander, as defendants, wherein was drawn in question the validity of a statue of said State and of a decision of the court of last resort of the said State on the ground of their being repugnant to the Constitution of the United States and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith, composing the firm of Hopkins, Dwight & Co., successors as aforesaid, and Lucius H. Smith, as trustee as aforesaid, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of

the said Supreme Court, the fifth day of May, in the year
7 of our Lord one thousand eight hundred and eighty-six.

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
Clerk of the Circuit Court of the United States for the District of South Carolina.

Allowed by—
W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE, *Clerk.*

[Endorsed:] The United States of America. Supreme Court. The State of South Carolina. In the supreme court. John J. McLure, as adm'r of the estate of George W. Melton, dec'd, *vs.* Margaret A. Melton and her infant children; Hopkins, Dwight & Co., and others. Writ of error.

[Stamped:] Supreme court of South Carolina. Clerk's office, Columbia, S. C. Filed May 27, 1886. Albert M. Boozee, clerk.

8 Rion's law office, Nos. 7 and 9 East Washington street.

WINNSBORO', S. C., 26 *April*, 1886.

To W. H. Kerr, clerk of the court, and Messrs. Douglass & McCauts, his attorneys:

You are hereby notified that the successors of Hopkins, Dwight & Co. and Lucius H. Smith, as trustee of Hopkins, Dwight & Co. and Margaret A. Melton and her infant children, intend to prosecute a writ of error from the Supreme Court of the United States to the supreme court of the State of South Carolina to review the decree of the latter court made on the 22nd day of April, 1886, in the case of Jno J. McLure, as administrator of the estate of George W. Melton, deceased, against the said Hopkins, Dwight & Co.'s successors, Lucius H. Smith, trustee as aforesaid, and others, the creditors of Geo. W. Melton, deceased, of whom you are one.

You will please inform me by notifying me at my office, Nos. 7 & 9 E. Washington street, Winnsboro', S. C., if you will join
9 in the said writ of error. If you do not signify your intention to do so the said the successors of Hopkins, Dwight & Co. and Lucius H. Smith, as trustee as aforesaid, will sue out the same alone.

JAS. H. RION,
Attorney for the Successors of Hopkins, Dwight & Co., and Lucius H. Smith, as Trustee.

We accept service of this notice this 26th day of April, 1886.
DOUGLASS & McCANTS,
Att'ys for W. H. Kerr, Clerk.

I accept service of this notice this 26th day of April, 1886.
W. H. KERR, *C. C. P.*

10 The United States of America to John J. McLure, as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Richmond Stove Company, the firm of Russell & Alger, the firm of Armstrong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith, composing the firm of Hopkins, Dwight & Co., the successors of Lucius Hopkins and Amos T. Dwight, composing the late firm of Hopkins, Dwight & Co., and Lucius H. Smith, as trustee of Hopkins, Dwight & Co. and of Margaret A. Melton and her infant children, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the decision rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. D. Simpson, chief justice of the supreme court of the State of South Carolina, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

11 [Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children and Hopkins, Dwight & Co. and others. Citation. I acknowledge the legal service of this citation by copy retained this 7th day of June, 1886. W. H. Kerr, C. C. C. P., F. C. Original.

12 The United States of America to John J. McLure, as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Richmond Stove Company, the firm of Russell & Alger, the firm of Armstrong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

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Witness the Honorable W. D. Simpson, chief justice of the supreme court of the State of South Carolina, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

13 [Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children and Hopkins, Dwight & Co. and others. Citation. We acknowledge the legal service of this citation by copy retained this seventh day of June, 1886. Hart & Hart, att'ys for the assignees of G. R. Ratchford. Original.

14 The United States of America to John J. McLure, as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament

of Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Richmond Stove Company, the firm of Russell & Alger, the firm of Armstrong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

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Witness the Honorable W. D. Simpson, chief justice of the supreme court of the State of South Carolina, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

15 [Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children and Hopkins, Dwight & Co. and others. Citation. I acknowledge the legal service of this citation by copy retained this eighth day of June, 1886. John J. McLure, adm'r of est. of Geo. W. Melton, dec'd. Original.

16 The United States of America to John J. McLure, as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Richmond Stove Company, the firm of Russell & Alger, the firm of Arm-

strong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith, composing the firm of Hopkins, Dwight & Co., the successors of Lucius Hopkins and Amos T. Dwight, composing the late firm of Hopkins, Dwight & Co., and Lucius H. Smith, as trustee of Hopkins, Dwight & Co. and of Margaret A. Melton and her infant children, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the decision rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. D. Simpson, chief justice of the supreme court of the State of South Carolina, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:
[Seal Supreme Court of South Carolina.]
ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

17 [Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children and Hopkins, Dwight & Co. and others. Citation. I acknowledge the legal service of this citation by copy retained this 8th day of June, 1886. Edward T. Atkinson. Original.

18 The United States of America to John J. McLure, as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Richmond Stove Company, the firm of Russell & Alger, the firm of Armstrong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

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preme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith, composing the firm of Hopkins, Dwight & Co., the successors of Lucius Hopkins and Amos T. Dwight, composing the late firm of Hopkins, Dwight & Co., and Lucius H. Smith, as trustee of Hopkins, Dwight & Co. and of Margaret A. Melton and her infant children, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the decision rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. D. Simpson, chief justice of the supreme court of the State of South Carolina, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court. S C.

Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

19 [Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children and Hopkins, Dwight & Co. and others. Citation. I acknowledge the legal service of this citation by copy retained this 8 day of June, 1886. The National Bank of Chester, S. C., by J. L. Harris, cash. Original.

20 The United States of America to John J. McLure, as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Richmond Stove Company, the firm of Russell & Alger, the firm of Armstrong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

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Hopkins Smith, composing the firm of Hopkins, Dwight & Co., the successors of Lucius Hopkins and Amos T. Dwight, composing the late firm of Hopkins, Dwight & Co., and Lucius H. Smith, as trustee of Hopkins, Dwight & Co. and of Margaret A. Melton and her infant children, are plaintiffs in error and you are defendants in errror, to show cause, if any there be, why the decision rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. D. Simpson, chief justice of the supreme court of the State of South Carolina, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:
[Seal Supreme Court of South Carolina.]
ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

21 [Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children and Hopkins, Dwight & Co. and others. Citation. We acknowledge the legal service of this citation by copy retained this 9th day of June, 1886. J. & J. Hemphill, att'ys for creditor, S. D. Melton. Original.

22 The United States of America to John J. McLure, as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Richmond Stove Company, the firm of Russell & Alger, the firm of Armstrong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith, composing the firm of Hopkins, Dwight & Co., the successors of Lucius Hopkins and Amos T. Dwight, composing the late firm of Hopkins, Dwight & Co., and Lucius H. Smith, as trustee of Hopkins, Dwight & Co. and of Margaret A. Melton and her infant children, are plaintiffs in error and you are defendants in error, to

show cause, if any there be, why the decision rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. D. Simpson, chief justice of the supreme court of the State of South Carolina, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

23 [Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children and Hopkins, Dwight & Co. and others. Citation. We acknowledge the legal service of this citation by copy retained this 9th day of June, 1886. W. Gill Wylie, W. H. Wylie, Annie W. Moore, per E. C. McLure, att'y. Original.

24 The United States of America to John J. McLure as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Richmond Stove Company, the firm of Russell & Alger, the firm of Armstrong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

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Witness the Honorable W. D. Simpson, chief justice of the su-

preme court of the State of South Carolina, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

25 [Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children and Hopkins, Dwight & Co. and others. Citation. I acknowledge the legal service of this citation by copy retained this 9th day of June, 1886. James Hemphill, by J. & J. Hemphill, att'ys. Original.

26 The United States of America to John J. McLure, as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Bechmon Stove Company, the firm of Russell & Alger, the firm of Armstrong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith, composing the firm of Hopkins, Dwight & Co., the successors of Lucius Hopkins and Amos T. Dwight, composing the late firm of Hopkins, Dwight & Co., and Lucius H. Smith, as trustee of Hopkins, Dwight & Co. and of Margaret A. Melton and her infant children, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the decision rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. D. Simpson, chief justice of the supreme court of the State of South Carolina, this 27th day of May,

in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:
[Seal Supreme Court of South Carolina.]
ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

27 [Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children and Hopkins, Dwight & Co. and others. Citation. We acknowledge the legal service of this citation by copy retained this 10th day of June, 1886. Armstrong, Cator & Co., per W. A. Sanders, att'y. Original.

28 The United States of America to John J. McLure, as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Richmond Stove Company, the firm of Russell & Alger, the firm of Armstrong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

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Witness the Honorable W. D. Simpson, chief justice of the supreme court of the State of South Carolina, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:
[Seal Supreme Court of South Carolina.]
ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

29 [Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children and Hopkins, Dwight & Co. and others. Citation. We acknowledge the legal service of this citation by copy retained this 9th day of June, 1886. McLure & McLure, att'ys for ex'rs of Mrs. Juliet A. Wylie. Original.

30 The United States of America to John J. McLure, as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Richmond Stove Company, the firm of Russell & Alger, the firm of Armstrong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith, composing the firm of Hopkins, Dwight & Co., the successors of Lucius Hopkins and Amos T. Dwight, composing the late firm of Hopkins, Dwight & Co., and Lucius H. Smith, as trustee of Hopkins, Dwight & Co. and of Margaret A. Melton and her infant children, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the decision rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. D. Simpson, chief justice of the supreme court of the State of South Carolina, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:
[Seal Supreme Court of South Carolina.]
ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

31 [Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children and Hopkins, Dwight & Co. and others. Citation. — acknowledge the legal service of this citation

by copy retained this — day of ——, 1886. We admit legal service of this citation by copy retained *pro forma* this 9th June, 1886; but, having no interest to be affected by the confirmation or reversal of the decision of the supreme court of this State herein, we will take no action in the Supreme Court of the United States either with the plaintiffs in error or against them. "The Richmond Stove Company," B. R. Smith & Co., Moses Benson, by Giles J. Patterson, survivor of Patterson & Goshen, their attorney. Original.

32 The United States of America to John J. McLure, as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Richmond Stove Company, the firm of Russell & Alger, the firm of Armstrong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith, composing the firm of Hopkins, Dwight & Co., the successors of Lucius Hopkins and Amos T. Dwight, composing the late firm of Hopkins, Dwight & Co., and Lucius H. Smith, as trustee of Hopkins, Dwight & Co. and of Margaret A. Melton and her infant children, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the decision rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. D. Simpson, chief justice of the supreme court of the State of South Carolina, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

33 [Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children and Hopkins, Dwight

& Co. and others. Citation. I acknowledge the legal service of this citation by copy retained this 10th day of June, 1886. S. W. Mobley. In presence of A. G. Brice. Original.

34 The United States of America to John J. McLure, as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Richmond Stove Company, the firm of Russell & Alger, the firm of Armstrong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

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Witness the Honorable W. D. Simpson, chief justice of the supreme court of the State of South Carolina, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

35 [Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children and Hopkins, Dwight & Co. and others. Citation. We acknowledge the legal service of this citation by copy retained this 11th day of June, 1886. J. & J. Hemphill, att'ys for Mrs. E. Erwin. We admit legal service of this citation by copy retained *pro forma* this 12 June, 1886; but, having no interest to be affected by the confirmation or reversal of the decision

of the supreme court of this State herein, we will take no action in the Supreme Court of the United States, either with the plaintiffs in error or against them. Brice & Wells, by Gates J. Patterson, sur. of Patterson & Goshen, their att'ys. Original.

36 The United States of America to John J. McLure, as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Richmond Stove Company, the firm of Russell & Alger, the firm of Armstrong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

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Witness the Honorable W. D. Simpson, chief justice of the supreme court of the State of South Carolina, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

37 [Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children, and Hopkins, Dwight & Co. and others. Citation. We acknowledge the legal service of this citation by copy retained this 11th day of June, 1886. J. & J. Hemphill, att'ys for Mrs. J. E. Moffatt & Russell & Alger. Original.

38 The United States of America to John J. McLure, as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Richmond Stove Company, the firm of Russell & Alger, the firm of Armstrong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith, composing the firm of Hopkins, Dwight & Co., the successors of Lucius Hopkins and Amos T. Dwight, composing the late firm of Hopkins, Dwight & Co., and Lucius H. Smith, as trustee of Hopkins, Dwight & Co. and of Margaret A. Melton and her infant children, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the decision rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. D. Simpson, chief justice of the supreme court of the State of South Carolina, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

39 [Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children and Hopkins, Dwight & Co. and others. Citation. We acknowledge the legal service of this citation by copy retained this fourth day of June, 1886. S. P. Hamilton, Jno. A. Graham. Original.

40 The United States of America to John J. McLure as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of

Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Richmond Stove Company, the firm of Russell & Alger, the firm of Armstrong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith, composing the firm of Hopkins, Dwight & Co., the successors of Lucius Hopkins and Amos T. Dwight, composing the late firm of Hopkins, Dwight & Co., and Lucius H. Smith, as trustee of Hopkins, Dwight & Co. and of Margaret A. Melton and her infant children, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the decision rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. D. Simpson, chief justice of the supreme court of the State of South Carolina, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

41 [Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children and Hopkins, Dwight & Co. and others. Citation. I acknowledge the legal service of this citation by copy retained this 18th day of June, 1886. W. A. Gaines. Original.

42 The United States of America to John J. McLure, as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Richmond Stove

Company, the firm of Russell & Alger, the firm of Armstrong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith, composing the firm of Hopkins, Dwight & Co., the successors of Lucius Hopkins and Amos T. Dwight, composing the late firm of Hopkins, Dwight & Co., and Lucius H. Smith, as trustee of Hopkins, Dwight & Co. and of Margaret A. Melton and her infant children, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the decision rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. D. Simpson, chief justice of the supreme court of the State of South Carolina, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

43 [Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children and Hopkins, Dwight & Co. and others. Citation. — acknowledge the legal service of this citation by copy retained this — ——, 1886. Original.

STATE OF SOUTH CAROLINA,
County of Fairfield.

W. H. Hood, sheriff of Chester Co., being duly sworn, says that he served the within citation on R. C. M. Alexander, Esq., by delivering to him personally and leaving with him a copy of the same at Chester, S. C., on the 29th day of June, 1886, and that he knows the one so served to be the person mentioned and described in the said citation as R. C. M. Alexander, a defendant herein, and deponent is not a party to the action.

W. H. HOOD,
Sheriff of Chester County, S. C.

Sworn to before me this 30 day of June, 1886.

T. M. GALBRAITH,
U. S. Commissioner.

44 The United States of America to John J. McLure, as administrator of the estate of Geo. W. Melton, deceased; W. H. Kerr, as clerk of the court of common pleas for Fairfield county, in the State of South Carolina; W. Gill Wylie, W. H. Wylie, and Annie Wylie Moore, as executors of the last will and testament of Juliet A. Wylie; Samuel D. Melton, the firm of G. R. Ratchford & Co., The National Bank of Chester, South Carolina, the firm of R. T. Wilson & Co., S. W. Mobley, Mrs. E. Erwin, S. Prioleau Hamilton, Mrs. J. E. Moffatt, James Hemphill, The Richmond Stove Company, the firm of Russell & Alger, the firm of Armstrong, Cater & Co., the firm of B. R. Smith & Co., the firm of Brice & Wells, Edward T. Atkinson, W. A. Gaines, J. A. Graham, Moses Benson, and R. C. M. Alexander, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith, composing the firm of Hopkins, Dwight & Co., the successors of Lucius Hopkins and Amos T. Dwight, compos-
45 ing the late firm of Hopkins, Dwight & Co., and Lucius H. Smith, as trustee of Hopkins, Dwight & Co. and of Margaret A. Melton and her infant children, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the decision rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. D. Simpson, chief justice of the supreme court of the State of South Carolina, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

W. D. SIMPSON,
Chief Justice Supreme Court S. C.

Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

[Endorsed:] United States of America. In the Supreme Court. State of South Carolina. In the supreme court. Jno. J. McLure, as adm'r of est. of Geo. W. Melton, deceased, *v.* Margaret A. Melton and her infant children and Hopkins, Dwight & Co. and others. Citation. J. M. Johnston. Original.

STATE OF NEW YORK, }
City and County of New York, } ss:

I, Edwin F. Corey, Jr., a commissioner for the State of South Carolina, duly commissioned and qualified, and residing in the city and county of New York, hereby certify that on the day of the date hereof I served the foregoing citation upon R. T. Wilson & Co. by leaving a true copy thereof with J. M. Johnston, a member of said

firm, at their office, No. 2 Exchange Court, in the city, county, and State of New York.

Witness my hand and official seal this eighth day of September, A. D. 1886.

[Seal Edwin F. Corey, Jr., Commissioner for South Carolina.]

EDWIN F. COREY, JR.,
Commissioner for the State of South Carolina.

Office, 60 Wall street, N. Y.

46 In the Supreme Court of South Carolina. November Term, 1885.

Appeal from Chester, sixth circuit.

JOHN J. MCLURE, as Administrator of the Estate of George W. Melton, Deceased, Respondent,

vs.

MARGARET A. MELTON and Her Infant Children, Appellants, and Others, the Creditors of said George W. Melton, Deceased, of Whom the Successors of Hopkins, Dwight & Co. and W. H. Kerr, as Clerk of Court for Fairfield County, are Appellants and all Others Respondents.

Case.

Rion, for Hopkins, Dwight & Co. and L. H. Smith, trustee; Douglass & McCants, for Kerr, clerk; Hamilton, for Mrs. Melton and children, for appellants. Geo. W. S. Hart, McLure & McLure, Patterson & Gaston, J. & J. Hemphill, for respondents.

47 In the Supreme Court of South Carolina. November Term, 1885.

Appeal from Chester, sixth circuit.

JOHN J. MCCLURE, as Administrator of the Estate of George W. Melton, Deceased, Respondent,

vs.

MARGARET A. MELTON and Her Infant Children, Appellants, and Others, the Creditors of said George W. Melton, Deceased, of Whom the Successors of Hopkins, Dwight & Co. and W. H. Kerr, as Clerk of Court for Fairfield County, are Appellants and all Others Respondents.

This action was commenced on the — day of July, 1877.

The defendants, Margaret A. Melton and her children, were, respectively, the widow and children of the intestate.

Among the creditors, all of whom were made defendants, are the successors of Hopkins, Dwight & Co., and W. H. Kerr, as clerk of court for Fairfield county. These two creditors held mortgages as hereinafter shown, and, together with Mrs. Melton and her children, are appellants.

Also among the defendant creditors are the legal representatives of Dr. A. P. Wylie and of G. R. Ratchford and of Sam'l D. Melton, specialty creditors, who are respondents. The note proved by the assignees of G. R. Ratchford bears date February 22, 1859.

In order to carry out the purposes of this action as set forth in the title (*i. e.*, to marshal assets, sell land, etc.), creditors were called in to prove their respective demands against the estate, and the cause was heard before Judges Cothran and Wallace, respectively, upon reports of referees.

By order of this court, made in October term, 1877, all the
48 real estate of which the intestate was seized and possessed at the time of his death was sold.

The mortgage creditor, W. H. Kerr, as clerk of court as aforesaid, established before the referee a mortgage of a tract of land situate in Fairfield county, executed and delivered on the 4th day of January, 1875, by the said George W. Melton to L. W. Duvall, as sheriff of Fairfield county, to secure a bond given for the credit portion of the purchase-money thereof, the said tract of land having been sold by said sheriff under the order of the court of common pleas for Fairfield county, and said bond and mortgage having been by the order of the same court transferred to the clerk of the court of said county of Fairfield. Said mortgage was recorded in the register's office of Fairfield county, and at the death of said George W. Melton was wholly unsatisfied. W. H. Kerr, the clerk of court of common pleas for Fairfield county, being the holder of said bond and mortgage, as such clerk presented and established the same before the referee, but was not previously made a party to the action. The mortgaged premises were sold under the order of sale hereinbefore mentioned, and the net proceeds thereof, to wit, $—, are now in the hands of the clerk of the court for Chester county. Subsequently to the presentation of said bond and mortgage before the referee under proceedings for foreclosure, instituted by W. A. Kerr, as clerk as aforesaid, in the court of common pleas for Fairfield county, against the purchaser of the said tract of land at the sale made under the order in this action, the same was sold again and the proceeds of this last sale were applied to the mortgage debt, leaving the balance due thereon as reported by the referee.

The debt proven by the successors of Hopkins, Dwight & Co. is a sealed note for $25,000, of date 19th May, 1876, secured by a mortgage upon land, also dated 19th May, 1876.

George W. Melton died 9th July, 1876, and the said mortgage was foreclosed and land was ordered to be sold by the court on 3d December, 1877. The land was so sold and the net sum realized was $6,207.05. This sum, applied as a credit, left due upon said mortgage debt upon the 1st February, 1884, the sum of $30,748.44.

49 For this balance the debt was proven against the estate, the rank of a mortgage debt being claimed for it, and that it was entitled to be paid accordingly out of the personal and real assets.

This rank was accorded to it and the mortgage claim of W. H. Kerr, as clerk, by A. G. Brice, referee, by his report filed 7th Feb-

ruary, 1884, which finding was reversed by his honor Judge Wallace by decree filed May 20th, 1885.

The assets in the hands of the administrator arising from the personal estate are from $4,000 to $8,000. The amount derived from sale of real estate is about $3,000; so that the total assets of the estate applicable to the payment of debts cannot exceed $11,000.

Mrs. Margaret A. Melton and her children are interested in the mortgage debt of Hopkins, Dwight & Co., for if the balance due upon this debt be not paid out of the assets of the estate of G. W. Melton it will have to be paid out of certain property which otherwise would be reserved as a trust estate for Mrs. Melton and her children. The trust deed from G. W. Melton to Lucius Hopkins, trustee, was the conveyance of real estate in the town of Chester for the use of Mrs. M. A. Melton and her three minor children, which deed was dated May 20th, 1876, the second paragraph of which reads as follows:

"Secondly. If at any time I shall be indebted to the said Lucius Hopkins or to any firm in which he is or shall be a copartner, and shall fail to pay the same on demand after the same shall be due and payable, and all such security for such debts in the hands of the said Lucius Hopkins or such firms, and all my other property and estate of whatsoever kind have been exhausted, then and in such case I authorize and empower the said Lucius Hopkins, at public auction or private sale, to sell and convey all or any part of said property hereinbefore conveyed and its accretions sufficient to pay such debt as aforesaid, and the remainder, if any, or the surplus remaining, if the whole shall be sold, shall yet be and remain under this trust and subject to all the then unfilled terms and conditions thereof."

Lucius Hopkins is dead, and Lucius H. Smith, trustee, has been substituted in his stead.

50 *Report of A. G. Brice, Referee.*

I, A. G. Brice, having been substituted as the special referee herein in the place of C. C. McCoy by an order of this court, and having been attended by the parties and their attorneys, and having finished taking the testimony, all of which is herewith filed, beg leave to submit the following as my report herein:

This case has been locked up in the court for some years and the complaint has been mislaid—at least I have never seen it—but I presume from the testimony and the papers offered in evidence that it was simply an action to marshal the assets of the estate of George W. Melton, and that all I am called upon to report will be the amount of available assets of said estate and the amount of the debts or liabilities thereof, together with the manner in which they shall be paid.

By the agreement of all the counsel the formal accounting on the part of the administrator was postponed, but from the testimony it will be seen that there are from four to eight thousand dollars in

his hands from the personalty applicable to the payment of debts, and in addition thereto, about three thousand dollars derived from the sales of real estate; so that the assets of the estate cannot exceed eleven thousand dollars.

I have calculated the entire indebtedness of the estate, including the interest due up to this date, and divided it into three classes, all of which will more fully appear by Exhibit- A, B, and C, hereunto attached and made a part of this report.

I therefore make the following findings of fact:

That the assets of the estate of George W. Melton cannot exceed eleven thousand dollars.

II. That the total amount due on bonds and mortgages established against said estate is thirty-one thousand eight hundred and thirty-five and $\frac{79}{100}$ dollars ($\$31,835\frac{79}{100}$), as is fully represented by Exhibit A, hereunto attached.

III. That the total amount due on the sealed obligations dated prior to the 25th of November, 1873, established against said estate is seven thousand and five and $\frac{4}{100}$ dollars ($\$7,005\frac{4}{100}$), as is fully represented by Exhibit B, hereunto attached.

IV. That the total amount due on simple contract and like
51 debts established against said estate is thirty-six thousand four hundred and fifteen and $\frac{98}{100}$ dollars ($\$36,415\frac{98}{100}$), as is fully represented by Exhibit C, hereunto attached.

V. That the total amount of all indebtedness established against said estate is seventy-five thousand two hundred fifty-six and $\frac{81}{100}$ dollars ($\$75,256\frac{81}{100}$).

From the testimony of Lucius H. Smith and Charles D. Miller it appears that on the 28th day of June, 1875, Geo. W. Melton transferred and delivered to Lucius Hopkins, of the firm of Hopkins, Dwight & Co., a policy of insurance on his life for $20,000.00, in the Equitable Life Insurance Company, and $25,000.00 of the first-mortgage bonds of the Kings Mountain R. R. Co., in trust for his wife and children, and to be liable for any indebtedness due by him to the firm of Hopkins, Dwight & Co., the terms and conditions of said trust being shown by Melton's letter to Hopkins of that date; and also that afterwards, on the 10th of May, 1876, the $25,000.00 in first-mortgage bonds and the income therefrom, then invested in $2,500.00 of the Chester Bank stock, were delivered back to Melton by said trustee in consideration of certain real estate in the town of Chester, S. C., conveyed to him in trust also, as will more fully appear by the trust deed from Melton to Lucius Hopkins, as trustee, of that date.

From these facts it was argued by Mr. Gaston, in behalf of the unsecured creditors, that the mortgage of Hopkins, Dwight & Co. could not receive any of the funds distributable in this action because in equity they are compelled to satisfy their demands, in the first instance, out of the trust funds in their hands as aforesaid and liable for their debts before they can come upon the funds in this action subject to the claims of all creditors. I am sorry this point has been brought to my attention just at the close of the report, for I would have been glad if it could have been fully discussed. The

position taken must stand or fall upon the construction of the trust contract as evidenced by the letter of the 28th of June, 1875. It rather seems to me, from the wording and general tenor of that letter, that the primary object of Melton was to create an estate
52 for the benefit of his wife and children which would be secondarily liable for the debts due by him to Hopkins, Dwight & Co. in the event that these debts could not be paid out of his property. If this be the proper construction, the position taken for the creditors is not tenable; and, assuming that the creditors here cannot question the authority of Melton to alter the terms of the trust as to the first-mortgage bonds and their income, as he has done by his trust deed to Hopkins of the 10th of May, 1876, then only the life insurance policy is subject to the terms of the trust of the 28th of June, 1875. On this policy the trustee collected $19,809.44 on the 29th of August, 1876. Now, as I understand the law, Hopkins, Dwight & Co. could have applied this money to any debt they held against Melton; and if they should apply $7,778.06 of it to the balance due on their open account, the creditors could not complain; and if this application had been made and the balance of the insurance money applied to the mortgage debt, there would then have remained due upon their mortgage a balance larger than the amount that will be applicable thereto out of the funds distributable in this action. Not being able to see my way clear, either in the construction of the trust contract or over the difficulties that would intervene after the construction contended for, I with some hesitancy overrule the position claimed for the creditors.

And as matters of law I find—

That, after the payment of the costs, the assets in this action are first applicable to the satisfaction of the bond and mortgage of L. W. Duvall, sheriff, and next to the bond and mortgage of Hopkins, Dwight & Co., and I recommend that they be so applied.

Respectfully submitted,

A. G. BRICE,
Special Referee.

Chester, S. C., 1st February, 1884.

"EXHIBIT A,"

Showing the amounts due on the bonds and mortgages against the estate of Geo. W. Melton, deceased, the same being preferred claims against said estate.

53	Amount due on the bond and mortgage of L. W. Duvall, sheriff, dated 4th June, 1875, credited by $228.75 3rd Nov., '79	$1,087 35
	Amount due on bond and mortgage of Hopkins, Dwight & Co., dated 19th May, 1876, and credited by $6,207.05 3rd Dec., '77	30,748 44
	Total due to date	$31,835 79

J. J. McLURE, Adm'r,
vs.
M. A. MELTON *et al.*

A. G. BRICE,
Special Referee.

Chester, S. C., 1st February, 1884.

EXHIBIT "B,"

Showing the amounts due on sealed notes and specialties dated prior to the 25th of November, 1873, and being the second class of claims established against the estate of Geo. W. Melton.

Sealed obligation to Samuel D. Melton, dated 1st Feb., '71	$2,000 00	
Int. from 1st July, '72	1,620 66	
		$3,621 66
Balance due on sealed note of Dr. A. P. Wylie, dated 3rd of May, 1872		1,883 38
Amount due on sealed note of G. R. Ratchford & Co., dated the 22nd of Feb., 1859		1,500 00
Total due to date		$7,005 04

J. J. McLURE, Adm'r,
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M. A. MELTON, *et al.*

A. G. BRICE,
Special Referee.

Chester, S. C., 1st February, 1884.

"EXHIBIT C,"

Showing simple contract claims, &c., against estate of Geo. W. Melton.

54	Note of Nat. B'k Chester, dated 30th Mar., '76	$2,002 25	
	Int. from 1st July, '76	1,062 79	
			$3,065 04
	Note of Nat. B'k Chester, dated 4th May, '76	$1,967 45	
	Int. from 4th Sept., '76	1,018 50	
			2,985 95
	Note of Nat. B'k Chester, dated 25th April, '76	$314 60	
	Int. from 25th July, '76	165 75	
			480 35
	Note of Nat. B'k Chester, dated 10th May, '76	$421 75	
	Int. from 10th Aug., '76	219 34	
			641 09
	Note of Nat. B'k Chester, dated 3rd April, '76	$651 60	
	Int. from 3rd July, 76	345 10	
			996 70

Note of Nat. B'k Chester, dated 13th June, '76	$2,001 50	
Int. from 13th July, '76	1,056 58	
		3,058 08
Balance due on note of Nat. Bank Chester, dated 23rd June, '76		1,069 13
Sealed note of R. C. M. Alexander	$665 00	
Int. at 10 per cent. from date, 7th July, '75	568 95	
		1,233 95
Sealed note of R. T. Wilson & Co. (1876)	$586 80	
Int. from 15th Nov., '76	296 04	
		882 84
Sealed note of S. W. Mobley, 8th Feb., '76	$500 00	
Int. from date at 12½ per cent. (annual)	718 68	
		1,218 68
55 Sealed note of Mrs. E. Erwin, 1st June, '76	$1,250 00	
Int. from date	670 82	
		1,920 82
Sealed note of Mrs. E. Erwin, 1st Mar., '76	$2,446 00	
Int. from date	1,355 48	
		3,801 48
Claim of S. P. Hamilton	$309 33	
Int. from 5th Jan., '80	88 10	
		397 43
Bal. due on sealed note of Mrs. J. E. Moffatt		1,784 09
Bal. due on sealed note of Jas. Hemphill		753 98
Draft of Bechmon Stove Co.	$941 51	
Int. from 21st Sept., '76	485 06	
		1,421 57
Balance due on note of Russell & Alger, and endorsed by Melton		339 57

Accounts.

Acc. of Armstrong, Cator & Co.	$97 92	
1st acc. of R. R. Smith & Co.	1,361 35	
2nd " "	3,778 13	
1st acc. of Brice & Wells	737 35	
2nd acc. of Brice & Wells	2,658 14	
Acc. of Dr. A. P. Wylie	276 75	
Bal. of acc. of E. T. Atkinson	180 00	
Acc. of W. A. Gaines	14 00	
Acc. of J. A. Graham	143 68	
Acc. of Moses Benson	97 16	
Acc. of R. C. M. Alexander	20 75	
		9,365 23
Total "Exhibit C"		$36,415 98

J. J. McLURE, Adm'r,
vs.
M. A. MELTON *et al.*

A. G. BRICE,
Special Referee.

Chester, S. C., 1st February, 1884.

56 *Recapitulation.*

Exhibit A	$31,835 79
Exhibit B	7,005 04
Exhibit C	36,415 98
Grand total	$75,256 81

A. G. BRICE,
Special Referee.

Filed 7th February, 1884.

Exceptions to Referee's Report.

The several and respective creditors of the estate of Geo. W. Melton that are represented in the above-entitled cause by Messrs. Patterson & Gaston and Geo. W. S. Hart except to the report of the referee, A. G. Brice, Esq.—

I. Because the said referee finds, reports, and recommends that the claims sought to be established herein in favor of Amos T. Dwight, survivor, and W. H. Kerr, clerk, referred to by him as "the bond and mortgage of Hopkins, Dwight & Co." and the "bond and mortgage of L. W. Duvall, sheriff," should be paid, and first paid, out of the fund under the control of the court in this cause.

II. Because the said referee does not find and report that the claim of Amos T. Dwight, survivor, can receive no portion of the fund now before the court until the other assets liable thereto have been exhausted, to wit, the property received from Geo. W. Melton, in 1875, by Lucius Hopkins, "subject" to the payment of the debts of Geo. W. Melton to any firm of which the said Lucius Hopkins was a member, and also the property substituted therefor.

III. Because the said referee does not find and report that the said property received from Geo. W. Melton by Lucius Hopkins and the property substituted therefor is primarily liable for the payment of the debt sought to be established herein in favor of Amos T. Dwight, survivor, and is sufficient in value to pay the said debt.

57 IV. Because the said referee does not find and report that the claims of Amos T. Dwight, survivor, and W. H. Kerr, clerk, are for balances due upon mortgage debts created since March 9, 1874, after the specific property mortgaged has been exhausted, and as such should receive no part of the fund before the court

until the claim of the assignees of G. R. Ratchford shall have been first paid in full.

PATTERSON & GASTON,
GEO. W. S. HART,
Attorneys for Creditors.

The executors of Mrs. Juliet A. Wylie, deceased, by E. C. McLure, their attorney, except to the report of A. G. Brice, Esq., referee herein, filed on the 7th day of February, 1884.

I. Because the said referee reports and recommends that the bond and mortgage of Hopkins, Dwight & Co. and the bond and mortgage of L. W. Duval, sheriff, should be first paid out of the fund under control of the court in this case.

II. Because the said referee does not find and report that the note established by the executors of Juliet A. Wylie, deceased, antedated the trust deed executed by the intestate, and should be paid before the *cestui que trust.* can derive any benefit under the said trust deed.

E. C. McLURE,
Attorney for Executors of Juliet A. Wylie, Deceased.

Please take notice that the several creditors represented by us in this case except to the report of the referee, A. G. Brice, Esq.—

I. Because the said referee finds and reports and recommends that the claims ought to be established herein in favor of Amos T. Dwight, survivor, and W. H. Kerr, clerk, referred to by him as "the bond and mortgage of Hopkins, Dwight & Co.," and "the bond and mortgage of L. W. Duval, sheriff," should be paid, and first paid, out of the funds under the control of the court in this case.

II. Because the said referee does not find and report that the claim of Amos T. Dwight, survivor, can receive no portion of
58 the fund now before the court until the other assets liable thereto have been exhausted, to wit, the property received from George W. Melton in 1875 by Lucius Hopkins, "subject" to the payments of the debts of Geo. W. Melton to any firm of which the said Lucius Hopkins was a member, and also the property substituted therefor.

III. Because the said referee does not find and report that the said property received from Geo. W. Melton by Lucius Hopkins and the property substituted therefor is primarily liable for the payment of the debts sought to be established herein in favor of Amos T. Dwight, survivor, and is sufficient in value to pay the said debt.

IV. Because the said referee does not find and report that the claims of Amos T. Dwight, survivor, and W. H. Kerr, clerk, are for balances due upon mortgage debts created since March 9th, 1874, after the specific property mortgaged has been exhausted, and as such should receive only their *pro rata* part of the fund in the control of the court for distribution.

J. & J. HEMPHILL,
Att'ys for Various Creditors.

Decree of Judge Wallace.

George W. Melton departed this life intestate on the 9th July, 1876, leaving him surviving his widow, Margaret A. Melton, and his three children, Lucius, Charles, and Jesse. The children were all under the age of twenty-one years at the time of his death.

Letters of administration upon his estate were duly granted to the plaintiff, J. J. McLure.

In discharging his duties as such administrator the plaintiff soon ascertained that the personal assets were totally insufficient to pay the debts of the estate, and he therefore filed this complaint, asking that the real property that was of the intestate at the time of his death be sold in aid of assets; that the assets be marshalled, and that the creditors of the estate be required to establish their demands in this proceeding.

59 In accordance with the prayer the complaint, under proper judicial orders, creditors were called in to establish their claims before a referee. Many claims were presented and established, and amongst them two, in regard to which the issues now exist that are to be decided.

One of these was a sealed note payable to Hopkins, Dwight & Co. and secured by a mortgage of real estate. This debt was further secured in the following way: In June, 1875, George W. Melton wrote to Lucius Hopkins, of the firm of Hopkins, Dwight & Co., of the city of New York, a letter, of which the following is a copy of the material parts: "I want it (the insurance policy), together with the $25,000 first-mortgage bonds, to be held by you in trust for my children, and desire that you hold me to strict accountability on same, only liable for any indebtedness to you or the firm of Hopkins, Dwight & Co." The insurance policy referred to was a policy upon his own life for twenty thousand dollars, with four instalments paid up, and he requests Hopkins in this same letter to continue to pay up the instalments, as they fall due, from the proceeds of the interest on the railroad bonds. The railroad mortgage bonds were twelve per cent. first-mortgage bonds of the Kings Mountain R. R. Co. At the time of this transaction G. W. Melton was abundantly solvent, with a large amount of property in excess of liabilities exclusive of these bonds. In May, 1876, after Melton had become insolvent from causes that arose subsequently to the 10th June, 1875, in pursuance of an agreement between them first previously made, Hopkins returned the railroad bonds, together with stock of the Chester Bank to the amount of twenty-five hundred dollars, which had been purchased by the interest received on the bonds to Melton, who on that day executed to Hopkins a deed of real property in lieu of the railroad bonds, to be held by him subject to the same limits and liabilities as the railroad bonds were subject to in his hands. The mortgage of Hopkins, Dwight & Co. has been foreclosed by a judicial sale of the land covered by it, and the proceeds of the sale were entirely insufficient to pay the debt, and the debt

and mortgage are now set up against the general assets in the hands of the administrator as a preferred claim.

W. H. Kerr, clerk of the court of Fairfield county, holds
60 officially a debt against the estate of Melton, secured by a mortgage upon real property lying in Fairfield county. The land covered by this mortgage was sold under an order of this court in this case before Kerr became a party to this action by proving his debt and mortgage; and after that sale, Kerr not having secured the proceeds of that sale, *Kerr* instituted proceedings to foreclose his mortgage in Fairfield county. Judgment was obtained and the land sold, but the proceeds of the sale were insufficient to pay the mortgage debt, and now Kerr sets up his debt and mortgage as a preferred debt against the general assets of the estate.

The referee held that both debts, under the authority of the case of Edward *vs.* Sanders, 6 S. C., 316, were preferred claims, and must be paid out of the general assets in preference to unsecured claims.

This finding is the ground of exceptions by the other creditors.

The referee further held that Hopkins, Dwight & Co. were not bound first to exhaust the trust property above referred to before they could claim any part of the fund in the hands of the administrator.

This finding is made the ground of exception by the other creditors.

One creditor claims in his exceptions that the trusts created by Melton for his family are fraudulent as to him, because his debt was in existence when the trusts were created. These three questions involve all the issues submitted at the hearing before me.

Is the debt and mortgage of Hopkins, Dwight & Co. a preferred claim, after its specific lien has been exhausted, because it is a mortgage?

The act of 1789, 2 Stat., p. 3, has been much discussed by our courts, in so far as it relates to the order of payment of the debts of a decedent. The case of Tunno *vs.* Happoldt, 2 McC., 188, followed by the case of Kinard *vs.* Young, 2 Rich. Eq., 258, in construing the language of that act decides that a mortgage is a preferred claim only so far as it is a lien upon specific property, and when that lien is exhausted the debt secured by it took rank according to the nature of the instrument by which it was evidence. As thus de-
61 clared the law stood until 14th Oct., 1875, when the case of Edwards *vs.* Sanders was filed, which announced a different rule as derived from the act of 1789, which had at that time been incorporated in the Revised Statutes of 1872. By this latter case it was held that after the specific lien of a judgment had been exhausted by foreclosure and sale the mortgage still took rank amongst judgments and executions as a mortgage, and this without any reference to the nature of the instrument by which the debt was evidenced. While this case stood as the declared rule of construction of the statute, the referee held that the mortgages set up in this case were preferred claims as such. Before this case came on to be heard upon the exceptions to the referee's report, the case of Piester *vs.* Piester, MSS., was filed, which reverses the rule as laid

down in Edwards *vs.* Sanders and re-establishes the rule as declared in Tunno *vs.* Happoldt and Kinard *vs.* Young, *supra.* Of course the mortgages in this case, then, are not preferred claims as such, unless there is some reason why they are not under the operation of Piester *vs.* Piester. Counsel accordingly argue that the mortgages here are not under the operation of this latter case, but are to be governed by the rule as stated in the case of Edwards *vs.* Sanders, because that was the declared rule by the court of last resort, while their mortgages were in existence, and rely upon the case of Herndon *vs.* Moore, and the cases there cited to support this position (18 S. C., 339).

As is well known to the profession, the supreme court of this State, in the case of Davenport *vs.* Caldwell, 10 S. C., 317, decided that the probate court had no jurisdiction in matters of partition of real property of deceased persons, and that the act of the General Assembly of 1868 providing for the exercise of such jurisdiction by that court was unconstitutional. The court of probate provided for in the constitution of 1868 was organized by act of the General Assembly of the same year, and immediately proceeded to exercise jurisdiction in the partition of real estates in pursuance of the power provided for in the organizing act. The trial judge, Hudson, J., in his opinion in the case of Herndon *vs.* Moore, *supra*, says: "No question was made as to the constitutionality of the act." "The profession at large and the probate courts and the circuit courts and the su-
62 preme court all recognized and acted upon a conceded jurisdiction to courts of probate in matters of partition." "Under this conceded and recognized jurisdiction from 1868 to 1878, thousands of acres of land have been sold in all parts of the State, a vast amount of money invested, conveyances and reconveyances made, titles and rights vested, and innocent purchasers acting under this common error, shared by legislatures, lawyers, and courts, have become involved." These facts are held by Hudson, J., sufficient to sustain the validity of sales, or at least to render them unimpeachable, made under partition proceedings in the probate court in the exercise of a jurisdiction provided for in an act of General Assembly decided to be unconstitutional, the ground of the opinion of Hudson, J., being that "a common error makes law."

The supreme court sustains the circuit judge in this view and rests the affirming opinion mainly upon the remark of Lord Ellenborough in the case of Isherwood *vs.* Olknow, 3 M. and S., 396 (54 Geo., 111), who says: "It has sometimes been said *communis error facit jus*, but I say *communis opinio* is evidence of what the law is, not where it is an opinion merely speculative and theoretical floating in the minds of persons, but where it has been made the groundwork and substratum of practice." The supreme court held in Herndon *vs.* Moore, *supra*, that the facts show that an opinion favorable to the jurisdiction of the probate court was the "groundwork and substratum of practice" for many years, and therefore sustain the validity of the proceedings. With a view to a clear apprehension of the rule it may be stated thus: Where, under a prevailing and common mistake as to the rule of law, contracts are made by which rights are acquired and obligations incurred which would not have

been made but for the existence of the common error, such contracts will be upheld and rights and liabilities under them enforced, because the law will not allow itself to be made an instrument of fraud and injustice.

Now in the case at bar the mortgage of Hopkins, Dwight & Co. was executed at a time when it had been declared by the court of last resort, that mortgages were preferred claims against the general assets even after its specific lien had been exhausted; but it does not appear that the contract had been made and the
63 mortgage executed under a common belief in the soundness of the rule declared to be the law at that time, or that the rule so declared had been "the groundwork and substratum of practice," or that the practice of taking mortgages would not have been the same if the rule as stated in Tunno *vs.* Happoldt, *supra*, had never been changed. It may be added that the rule laid down in Edwards *vs.* Sanders cannot be considered as within the description of the words *communis error facit jus*, because McGowan, A. J., in the opinion in the case of Piester *vs.* Piester states substantially that the profession in the State had never accepted that rule as sound construction. The rule, therefore, as stated in Piester *vs.* Piester is binding upon this court and there is nothing to take the mortgages in this case from under its operation. It follows that the mortgages here must take rank as against the assets in the hands of the administrator according to the nature of the instruments the mortgage was given to secure, and that the specific lien of the mortgages having been exhausted they are no longer preferred claims as mortgages.

I have not discussed the facts relating particularly to the mortgage set up by Mr. Kerr, because he can stand at least on no better ground than the other mortgage, his mortgage having been executed before the decision in the case of Edwards *vs.* Sanders was filed. The next question relates to the nature and effect of the transfer of property by G. W. Melton to Hopkins by the letter of the 28th June, 1875, and the subsequent substitution of other property and the conveyance of the substituted property by trust deed.

It clearly appears that at the time of the letter first declaring the trust and its objects that G. W. Melton was abundantly solvent; his property was largely in excess of his liabilities. To transfer his property then to or for his children without valuable consideration was not a fraud upon any one and was a perfectly valid transaction. No actual fraud is alleged or proved. Melton's subsequent failure could not affect a transaction unimpeachable at the time of its performance. After his failure he conveyed other property to the trustee for his wife and children. But this conveyance was not voluntary, for the property then conveyed was conveyed as
64 an equivalent and in consideration of the railroad bonds and the Chester Bank stock held in trust by the trustee. It does not appear that the property received by Melton for his last conveyance was not a full and fair equivalent for the property conveyed; so there is no fraud in that.

The trust, therefore is a valid one and the beneficiaries entitled to

the benefit of it. It is insisted, however, that under the terms and conditions under which the trust is held that the trust property must be first applied in payment of the debt of Hopkins, Dwight & Co. before that debt can receive any part of the general assets, upon the ground that Hopkins, Dwight & Co., having two funds to which they may resort, must first exhaust that fund upon which other creditors have no right to go. The principle here set up is well established as a general rule, and there are exceptions and modifications of it as well established as the rule. The trust being a valid one, the beneficiaries have a distinct interest and equity under it at least equal to the equity of creditors. The equity of creditors to require Hopkins, Dwight & Co. to go upon the trust fund is met by the equity of the beneficiaries of the trust that he should not be allowed to do so, and under such circumstances the general equitable rule first referred to will not be applied.

1 Story's Eq. Jurisdiction, p. 624 (12 ed.), note 3 to par. 645.
3 Pom. Eq. Jur., p. 462, sec. 1414.

Upon this point authorities might be multiplied, but it is not supposed that there is any difference of opinion upon the subject.

It is therefore adjudged that the lien of the mortgages referred to in the foregoing opinion having been exhausted they are no longer preferred claims, and the debts they were given to secure can only be proved and take rank against the assets in the hands of the administrator, according to the nature of the instrument evidencing the debt and the statute relating thereto.

It is further adjudged that the debt considered here as the mortgage debt held by Hopkins, Dwight & Co., no matter who may own it now, can only resort to the trust estate referred to in this
65 opinion after it has received all the money applicable thereto from the general assets.

It is further adjudged that the trust created by G. W. Melton is not fraudulent as to any debts existing at the time of the creation of the trust.

W. H. WALLACE.

Filed 20th May, 1885.

The parties whose exceptions follow served their notices of appeal according to law.

Exceptions to Decree.

The defendants, Hopkins, Dwight & Co. and Lucius H. Smith, trustee, except to the decree of his honor Judge William H. Wallace, made herein, and filed on the 20th day of May, 1885—

I. For that his honor the presiding judge held that the lien of the mortgage held and owned by Hopkins, Dwight & Co.'s successor has been exhausted, and that the debt secured thereby is no longer a preferred claim, and can only be proved and take rank against the assets in the hands of the administrator according to the nature of the instrument evidencing the debt and the statute relating thereto.

II. For that his honor the presiding judge did not hold that the

rank given by the referee to the debt and mortgage securing the same of Hopkins, Dwight & Co.'s successor, being in accordance with the decision of the supreme court in force at the time of the commencement of the action and of the finding of the referee, must be sustained.

III. For that his honor the presiding judge did not hold that the law in force at the time of the execution of the note and mortgage securing the same and at the time of the death of the intestate should determine the rank of the debt as a claim against the estate.

IV. For that his honor the presiding judge held that there was no proof that said note and mortgage were executed by the parties with reference to the decision of Edwards *vs.* Sanders, whereas
66 he should have held that the parties were to be presumed to have contracted with reference to the law as expounded by our highest court at the time.

V. For that the ruling of his honor the presiding judge that the rank of appellants' claim should be determined by the decision of Piester *et al.*, ex'rs, *vs.* Piester *et al.*, rendered by the Supreme Court after the execution of the contract, after the death of the deceased, after the commencement of this action, and after the referee's decision upon the claim, was giving said decision of Piester *et al.*, ex'rs, *vs.* Piester *et al.* a force and effect in violation of sec. 10, art. I, of the Constitution of the United States.

VI. For that the decision of the supreme court in the case of Piester *et al.*, ex'rs, *vs.* Piester *et al.*, as (or if) applied to appellants' claim, is in violation of section 10, article I, of the Constitution of the United States.

JAS. H. RION,
Att'y for Hopkins, Dwight & Co. and Lucius H. Smith, Trustee.

W. H. Kerr, clerk of the court of common pleas for Fairfield county, a mortgage creditor of the said George W. Melton, who came in under the order calling in creditors, and established his mortgage debts in this action, excepts to the decree of his honor Judge W. H. Wallace, made herein, and filed on the 20th day of May, 1885—

I. For that his honor held and adjudged that the lien of said mortgage having been exhausted it is no longer a preferred claim, and that the debts it was given to secure can only be proved and take rank against the assets in the hands of the administrator according to the nature of the instrument evidencing the debts.

II. For that his honor did not hold and adjudge that George W. Melton, the mortgagor, having died on the 9th day of July, 1876, the law in force at intestate's death, to wit, sections 3 and 4 of chapter XC of the General Statutes enacted in 1872, controls the application of the assests which came to the hands of his administrator; and, according to the order of payment of a decedent's debts therein prescribed, a mortgage *eo nomine* is a preferred claim and must be paid out of "the assets which come to the hands of the administrator" before bonds, sealed notes, and simple contracts, irrespective of their dates.

67 III. For that his honor did not hold and adjudge that the

rights of said W. H. Kerr, as the legal owner and holder of an unsatisfied mortgage, dated 4th January, 1875, as clerk as aforesaid, to his appropriate share of such assets, to be applied according to the positive requirements of the statute, became at the death of the said George W. Melton, the mortgagor, a vested right or interest of which he could not be constitutionally deprived or divested.

IV. For that his honor did not adjudge that the report of the referee be confirmed, and that the assets of said intestate be applied as therein held and determined.

V. For that his honor did not adjudge that so much of the proceeds arising from the sale of the mortgaged premises under the order of the court in this action as are in the hands of the clerk of this court be applied to said mortgage debt.

DOUGLASS & McCANTS,
Attorneys for W. H. Kerr, Clerk as Aforesaid.

The defendant, Margaret A. Melton, and her three minor children, Lucius H., Charlie Nannette, any Georgia Melton, except to the decree of the Hon. W. H. Wallace herein, filed 20th May, 1885, on the following grounds:

I. Because his honor erred in finding as matter of law that the judgment of Hopkins, Dwight & Co. for the deficiency after the sale of certain mortgaged premises was not a preferred claim in the distribution of the assets of the estate of George W. Melton, deceased.

II. Because the contract between George W. Melton and Lucius Hopkins, trustee under the trust deed of May 10th, 1876, was made with reference to the law as it then stood and as declared by the act of the General Assembly of 14th December, 1878, and his honor erred in applying the law of Piester *vs.* Piester, decided by the supreme court, to this case as giving such decision a retroactive effect, in violation of section 10, article I, of the Constitution of the United States and to the destruction of the vested rights of these defendants.

S. P. HAMILTON,
Defendants' Attorney.

68 *Agreement of Counsel.*

We agree that the foregoing shall constitute the case for appeal in this cause.

JAS. H. RION,
DOUGLASS & McCANTS,
S. P. HAMILTON,
Appellants' Attorneys.
GEO. W. S. HART,
McLURE & McLURE,
PATTERSON & GASTON,
J. & J. HEMPHILL,
Respondents' Attorneys.

Chester, S. C., 23d June, 1885.

CHESTER COUNTY, CLERK'S OFFICE.

I hereby certify that the foregoing is a true copy of the agreement on file in my office. Given under my hand and seal of office this the 13 day of July, 1885.

[Seal of Office.]

JOHN C. McFADDEN,
Clerk Circuit Court.

Filed July 15th, 1885.

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk of Supreme Court of S. C.

69 THE STATE OF SOUTH CAROLINA:

In the Supreme Court. November Term, 1885.

JOHN J. McLURE, as Administrator of the Estate of George W. Melton, Deceased, Plaintiff, Respondent,

vs.

MARGARET A. MELTON and Her Infant Children and Others, the Creditors of George W. Melton, of Whom the Successors of Hopkins, Dwight & Co. and W. H. Kerr, as Clerk, are Appellants, the Other Creditors Being Respondents, Defendants.

Opinion.

McIVER, *A. J.:*

The facts of this case, so far as necessary for a proper understanding of the points made by the several appeals, are substantially as follows: On the 9th of July, 1876, Geo. W. Melton died intestate, and, his estate being found to be largely insolvent, this action was commenced in July, 1877, to marshal the assets. Creditors were called in and numerous claims were established, but the only ones that need be specially stated are the following: A note under seal to G. R. Ratchford & Co., bearing date 22nd of February, 1859; a note under seal to Dr. A. P. Wylie, bearing date 3rd of May, 1872; a note under seal to Samuel D. Melton, bearing date 1st of February,
70 1871; a bond, secured by a mortgage of real estate to Duvall, sheriff, dated 4th of June, 1875, which has been transferred to the defendant Kerr, as clerk of the court for Fairfield county, and a bond, secured by a mortgage of real estate to Hopkins, Dwight & Co., dated 19th of May, 1876.

The mortgage to Hopkins, Dwight & Co. has been foreclosed, and, the proceeds of the sale of the mortgaged premises being insufficient to pay the debt, the balance is now set up against the general assets, and preference for it is claimed as a mortgage debt. The land covered by the Kerr mortgage was sold under an order in this cause before Kerr became a party by proving his mortgage debt, and after that sale, Kerr not having got the proceeds, he brought his action to foreclose his mortgage against the purchaser at the sale made under the order in this cause, and the land was sold again, but, the pro-

ceeds of this last sale being insufficient to pay his debt, the balance is now set up as a mortgage debt against the general assets.

The circuit judge held that the liens of the two mortgages having both been exhausted, the rank of these debts must be determined by the nature of the obligations which they were given to secure and cannot be classed as mortgages. The appellants question the correctness of this ruling, and the defendant Kerr also appeals upon the ground that the circuit judge erred in not holding "that so much of the proceeds arising from the sale of the mortgaged premises under the order of the court in this action as are in the hands of the clerk of this court be applied to said mortgage debt. In relation to this last-mentioned ground of appeal we have only to say that we are unable to discover where any such question was made in the court below. It does not appear that the referee ruled, or was asked to rule, upon it, and no such question was considered or passed upon by the circuit judge, and therefore we do not see how we can consider it. There is nothing in the "case," as prepared for argument here, to show that an order directing the proceeds of the first sale to be applied to the Kerr mortgage was ever applied for. Whether such an order should be granted, or whether Kerr has elected to ignore the first sale by bringing his action to foreclose his mortgage against the purchaser at such sale and thereby lost the right to claim the proceeds, or whether the purchaser at that sale may not have equities which entitle him to be heard, are all questions upon which we do not desire to be understood as intimating any opinion, inasmuch as we do not think the question presented by this ground of appeal is properly before us.

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The circuit judge based his decision upon the main point involved in these appeals—that is, as to the rank of the claims of Hopkins, Dwight & Co. and Kerr, clerk—upon a recent decision of this court in the case of Piester *vs.* Piester, 22 S. C. Rep., 139, and there can be no doubt that if that case applies to this it fully sustains the decree of the circuit judge. The appellants, however, contend that the case of Piester *vs.* Piester cannot be so applied for the reason that to so apply it would impair the obligation of contracts, or would divest vested rights, inasmuch as at the time of the death of the intestate, and at the time of the making of one of the contracts in question, that of Hopkins, Dwight & Co., the law as then declared by the case of Edwards *vs.* Sanders, 6 S. C. Rep., 316, required that the balances due on these two debts should be ranked as mortgages, and as such entitled to priority over specialty debts; and that the subsequent change in the law, as it is called, by the decision in Piester *vs.* Piester, cannot have the effect of divesting the rights of these appellants, which became vested at the time of the death of the intestate, under the law as it was then declared to be. For a clearer understanding of the questions raised, it may be well to repeat here the dates of the several transactions and matters referred to. The date of the sealed note to Ratchford & Co., one of the respondents, is 22nd of February, 1859; the sealed note to S. D. Melton, 1st of February, 1871; the sealed note to Wylie, 3rd of May, 1872; the Kerr bond & mortgage, 4th of June, 1875; the

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bond & mortgage to Hopkins, Dwight & Co., 19th of May, 1876; the death of the intestate, 9th of July, 1876. The decision in the case of Edwards *vs.* Sanders was filed 14th of October, 1875, though the book of reports in which it is found was not published until some
73 time in the year 1877, and the decision in the case of Piester *vs.* Piester, filed 10th of January, 1885, and the decree appealed from, 20th of May, 1885. The construction which is now placed upon the statute prescribing the order in which the debts of a decedent must be paid is the same as that which was adopted by the law court in the case of Trunno *vs.* Happoldt, 2 McC., 188, as far back as 1822, and reaffirmed by the court of equity in the case of Kinard *vs.* Young, 2 Rich. Eq., 247, in 1846. Thus the law stood unquestioned, so far as we are informed, down to the year 1875, when the decision in Edwards *vs.* Sanders, *supra*, was made, overruling the two former cases and placing upon the statute the construction now contended for by the appellants. This last-named decision does not seem to have been followed in a single instance, and from what is said in the case of Piester *vs.* Piester it would seem to have been never satisfactory to the profession, and that at the first opportunity which was afforded it was overruled, the Legislature in the meantime having, by the act of 1878, 16 Stat, 686, shown its dissatisfaction with the construction therein adopted by declaring "that in the administration of the assets of a decedent mortgages shall not be entitled to a priority over rents, debts by specialty, or debts by simple contract, except as to the particular parts of the estate affected by the liens of such mortgages; that after the property cov-
74 ered by the liens is exhausted the grade of the demand shall be determined by the nature of the instrument which the mortgage was given to secure." It is true that in the case of Piester *vs.* Piester no express reference is made to the difference in the phraseology of the original act of 1789, and that — adopted when it was incorporated in the general statutes of 1872, upon which stress seems to be laid in the argument of one of the counsel for appellants, but the whole subject was carefully considered before any conclusion was reached; nor do we find in the case of Edwards *vs.* Sanders that any allusion was made to such change in the phraseology as a reason for a change in the construction of the act. The question, then, is, Does the decision in the case of Piester *vs.* Piester effect such a change in the law as would forbid its application to the case under consideration because it would impair the obligation of a contract or would divest rights vested under the law, as declared in the case of Edwards *vs.* Sanders? As we have seen, the proper construction of the statute in question had been settled for a long series of years by decisions of both the courts of final resort in this State, in accordance with the view now declared to be the proper construction of that statute, and it seems to us that it would be going very far to say that a single isolated decision, never recognized or followed in any subsequent case and never recommending itself to the approval of
75 the profession, should be regarded as having the effect of changing the law. On the contrary, whatever may be the opinions of individuals as to its correctness, it must be regarded as

an erroneous declaration of what was the law and as only the law of the particular case in which it was made. We do not think that the case of Herndon *vs.* Moore, 18 S. C. Rep., 339, relied on by the appellants, is applicable here. In that case there were many potential elements, such as long and universal acquiescence, sales made and money paid, which are not found here. Moreover, it will be observed that the majority of the court concurred only in the result, and hence that case can only be regarded as authority on the precise question therein adjudged, as presented under the special circumstances therein stated. It is true that the Supreme Court of the United States have in numerous cases held that where a contract is valid at the time it is made, under the laws of the State as then expounded, its validity or obligation cannot be impaired by any subsequent judicial decision giving a different exposition of the law, and this court has in two cases (The Bond Debts Cases, 12 S. C. Rep., 282, and Whaley *vs.* Gaillard, 21 S. C. Rep., 572) deferred to the authority of that Court in that class of cases which involve the question whether a particular law or decision is in violation of that clause of the Constitution which forbids a State from passing any
76 law impairing the obligation of a contract; but even in the Supreme Court of the United States this doctrine is confined to cases of contract, and even in such cases it is at least doubtful whether it would be applied where, at the time the contract was made, the law had been declared only by a single isolated case, never recognized or followed and overruled at the first opportunity presented. See the cases of The Ohio Life & Trust Co. *vs.* Debolt, 16 How., 432; Gelpcke *vs.* Dubregue, 1 Wall., 175; Lee County *vs.* Roger, 7 Wall., 181; Butz *vs.* City of Muscatine, 8 Wall., 575; The City *vs.* Lamson, 9 Wall., 477; Olcott *vs.* The Supervisors, 16 Wall., 678.

Assuming, then, for the sake of the argument only, that there was a change in the law by the decision in the case of Piester *vs.* Piester before the doctrine above cited from the Supreme Court of the United States could be applied in this case, it must appear that this is a case of contract, and that to give effect to such change in the law would impair the obligation of such contract. We do not see that the law as declared in Piester *vs.* Piester impairs or in any way affects the validity or obligation of any contract. It does not purport to interfere in any respect with the validity or binding obligation of any contract set up by the appellants. It simply declares the proper construction of a statute prescribing the order in which the debts of a decedent are to be paid. In Harrison *vs.* Sterry, 5 Cranch.,
77 289, the question was as to the right of the United States to priority under an act of Congress. It was contended that as the contract was made with foreigners in a foreign country the law of the place where the contract was made must govern, and under that law no such priority was recognized; but the court held otherwise. Marshall, C. J., while recognizing the doctrine that the *lex loci contractus* governed, in expounding the contract, adds: "But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege dependent on the law of

the place where the property lies and where the court sits which is to decide the cause. In the familiar case of the administration of the estate of a deceased person the assets are always distributed according to the dignity of the debt, as regulated by the law of the country where the representative of the deceased acts and from which he derives his powers, not by the law of the country where the contract was made." This language is quoted with approval in the subsequent case of Smith *vs.* Union Bank of Georgetown, 5 Peters, 518. We do not see, then, how any change in the law prescribing the order in which debts of a decedent are to be paid can be said to impair the obligation of any contract by which such debts were created; but even if such should be the case it seems to us that the practical result in this case would be the same as that reached by the circuit judge. For if, as we concede, parties are to be presumed to contract with reference to the law as it exists
78 at the time the contract is entered, and if the law fixing the order in which debts of a decedent are to be paid enters into and forms a part of the contract by which such debts were created, then it follows necessarily that the respondents, Ratchford & Co., Dr. Wylie, and S. D. Melton, whose debts were created at a time when, under the decisions of Tunno *vs.* Happoldt and Kinard *vs.* Young, they were entitled to priority over the appellants, they could not be deprived of such priority by the subsequent change in the law, as it is called, by the decision in the case of Edwards *vs.* Sanders, for the fact that the intestate did not die until after the so-called change was made could not affect the validity of contracts made before that time, for certainly a circumstance occurring after a contract has been made cannot be said to enter into or form a part of such contract.

But, as we have said, we do not see that any change in the law prescribing the order for the payment of the debts of a decedent can be properly said to impair the obligation of any contract, and therefore, whatever other objection may be urged, it is not amenable to the charge that it violates those clauses of the constitution of this State and the United States which forbid the passage of laws impairing the obligation of contracts.

It is contended, however, that upon the death of a decedent the rights of his creditors to the payment of their debts, according to the law then in force, become vested, and that such vested rights
79 cannot be impaired or taken away by any subsequent change in the law. Applying this doctrine to the facts of this case, appellants insist that under the law as it was declared to be by the case of Edwards *vs.* Sanders, at the time of the death of the intestate, they were entitled to priority, and that any subsequent change in the law cannot deprive them of such priority. Without repeating here what we have said above, that we do not assent to the fundamental proposition upon which the doctrine contended for rests, to wit, that the law ever was as it was incorrectly announced to be in Edwards *vs.* Sanders, we will, for the sake of argument only, assume the contrary, and proceed to consider the question whether the ap-

pellants can claim such vested right of priority as that it cannot be divested by any change in the law.

We do not understand that there is anything in the Constitution of the United States which forbids a State from enacting a retrospective law or a law divesting a vested right, provided in so doing the obligation of a contract is not impaired. Watson *vs.* Mercer, 8 Peters, 88; Jackson *vs.* Lamphire, 3 Peters, 280; Satterlee *vs.* Matthewson, 2 Peters, 380; Charles River Bridge *vs.* Warren Bridge, 11 Peters, 420; Curtis *vs.* Whitney, 13 Wall., 68; nor is there any provision in the constitution of this State, as in some of the other States, forbidding the enactment of retrospective laws or any provision which, in express terms, forbids the enactment of a
80 law divesting vested rights, though certain safeguards are thrown around such rights by the provisions of sections 14 and 23 of art. I of the Constitution. In the case of Miles *vs.* King, 5 S. C. Rep., 146, it was held that the act of 1866, which required all instruments in writing of which a record is required by law, and of which the record has been lost or destroyed but the original preserved, to be again recorded within a specified time, otherwise that they should not prevail as liens against subsequent purchasers or creditors without notice, was a constitutional and valid law. Now, in that case the plaintiff, by recording his mortgage, which was executed in 1855, under the law then in force, had acquired a vested right, so to speak, of priority over all subsequent purchasers and creditors, and yet it was held that such vested right was divested by his failure to comply with the requirements of the subsequent act of 1866. In delivering the opinion of the court in that case Moses, C. J., uses this language: "The General Assembly has power to divest rights and to enact statutes retrospective in their action, provided they do not impair the obligation of a contract;" and again: "A vested right may be divested by the Legislature, unless it exists by virtue of or in the nature of a contract." Now, while we are not prepared to indorse this language without some qualifications, as it would, in its unqualified form, imply that the Legislature
81 had power to divest a vested right of property, yet we agree that every vested right, so called, is not beyond the reach of the Legislature. It is very difficult, if not impossible, to define precisely those rights which are so vested as to be protected from legislative interference, as is shown in the discussion of this subject by that eminent author, Judge Cooley, in his work on Constitutional Limitations, and we shall not undertake to do so on the present occasion. It is sufficient for us to say that the right of priority given to certain classes of creditors by the statute prescribing the order in which the assets of a decedent's estate shall be applied to the payment of his debts is a mere direction to the executor or administrator, as the case may be, as to the manner in which he shall administer such assets, which is at all times subject to legislative control and does not confer any such vested right upon the creditors as to place it beyond such control. This seems to have been the principle upon which the Supreme Court of the United States acted in Bank of Hamilton *vs.* Dudley, 2 Peters, 492. In that case an act

of 1795, which seems to have been of force at the time of the death of the intestate and at the time letters of administration upon his estate were granted, authorized administrators to sell lands for the payment of debts. This act was repealed on the 1st of June, 1805, and in August following the court of common pleas granted an order authorizing the administrators to sell the land
82 in controversy, who proceeded to do so, and the question was as to the validity of the sale. It was contended on the part of the plaintiffs in error that the interest of the administrators in the real estate, as trustees for the creditors, was a vested interest, which the repeal of the law could not divest; but the court held otherwise, and Marshall, C. J., in delivering the opinion, used this language: "The repeal of such a law divests no vested estate, but is the exercise of a legislative power which every legislature possesses. The mode of subjecting the property of a debtor to the demands of a creditor must always depend on the wisdom of the Legislature." It is not to be denied that some of the language used by that distinguished jurist, Johnston, Ch., in the case of Morton & Courtney *vs.* Caldwell, 3 Strob. Eq., 161, when considered apart from the question then under consideration, does seem to support the view contended for by the appellants; but the question in that case was so wholly different from the one now under consideration that to apply the language there used to a totally different question would inevitably lead us into error. The question there was to what period of time must we look in order to ascertain the amount of a claim against a decedent's estate in order to determine its *pro rata* share of the assets of such estate, and the question now before us, as to
83 whether the law-making power could not change the direction previously given as to the manner of administering the assets of a decedent's estate, was not considered or even hinted at. We do not see, therefore, that there was any error, in any respect, in the judgment appealed from.

The judgment of this court is that the judgment of the circuit court be affirmed.

Simpson, C. J., and McGowan, A. J., concur.

Filed April 22nd, 1886.

A true copy.
Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk of the Supreme Court.

83½ [Endorsed:] The State of South Carolina. Supreme court. November term, 1885. John J. McLure, as adm'r of the estate of George W. Melton, dec'd, *vs.* Margaret A. Melton and her infant children, Hopkins, Dwight & Co., and others. Opinion. (Certified copy.)

84 UNITED STATES OF AMERICA, *State of South Carolina:*

Know all men by these presents that we, Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith, constituting the firm of Hopkins, Dwight & Co., successors of Lucius Hopkins and Amos T. Dwight, constituting the firm of Hopkins, Dwight & Co. on the 9th day of July, 1876, and Lucius Hopkins Smith, as trustee of Hopkins, Dwight & Co. and of Mrs. Margaret A. Melton and her children, are held and firmly bound unto John J. McLure, as administrator of the goods, chattels, and credits which were of George W. Melton, deceased; to the executors of the last will and testament of Mrs. Juliet A. Wylie, deceased; to G. R. Ratchford & Co., and others, the specialty creditors of the estate of the said George W. Melton, deceased, and to the firm of Armstrong, Cator & Co., and the firm of B. R. Smith & Co. and others, the simple contract creditors of the estate of the said George W. Melton, deceased, in the full and just sum of twenty thousand dollars, to be paid to the above-named obligees, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

85 Sealed with our seals and dated this the sixth day of May, in the year of our Lord one thousand eight hundred and eighty-six, and in the one hundred and tenth year of the sovereignty and Independence of the United States of America.

Whereas lately, at a term of the supreme court of the State of South Carolina, in a suit depending in said court between "John J. McLure, as administrator of the estate of George W. Melton, deceased, respondent, and Margaret A. Melton and her infant children, appellants, and others, the creditors of said George W. Melton, deceased, of whom the successors of Hopkins, Dwight & Co. and W. H. Kerr, as clerk of court for Fairfield county, are appellants, and all others respondents," a decree was rendered against the said Hopkins, Dwight & Co., and the said Hopkins, Dwight & Co. having, together with said Lucius Hopkins Smith, as trustee as aforesaid, obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the decision in the aforesaid suit, and a citation directed to said administrator and creditors, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Hopkins, Dwight & Co., successors as aforesaid, and Lucius Hopkins Smith, trustee as aforesaid, shall prosecute their said writ of

86 error to effect and answer all damages and costs if they shall fail to make their said plea good, then the above obligation to be void, or else to remain in full force and virtue.

GUSTAVUS C. HOPKINS. [L. S.]
CHAS. D. MILLER. [L. S.]
LUCIUS H. SMITH. [L. S.]
LUCIUS H. SMITH, *Trustee.* [L. S.]

Signed, sealed, and delivered in the presence of—
C. C. BLOSSOM.

STATE OF NEW YORK, }
City and County of New York, } ss:

On this sixth day of May, 1886, personally came Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith before me, Edwin F. Corey, Jr., a commissioner of deeds for the State of South Carolina, said persons being to me personally well known and to me known to be the individuals described in and who executed the within bond, and acknowledged that they severally executed the same.

Given under my hand and seal of office the day and year above written.

EDWIN F. COREY, JR.,
Commissioner for the State of South Carolina in New York.

87 UNITED STATES OF AMERICA, }
Southern District of New York. }

I, Timothy Griffith, clerk of the circuit court of the United States for the southern district of New York, do hereby certify that the within-named obligors are known to me to be perfectly good and responsible for the penalty named in the foregoing bond, to wit, twenty thousand dollars.

Given under my hand and seal of office this the seventh day of May, A. D. 1886.

TIMOTHY GRIFFITH,
Clerk U. S. Circuit Court, Southern District of New York.

Approved by—
W. D. SIMPSON,
Chief Justice So. Ca.

Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk Supreme Court S. C.

Filed May 27th, 1886.

ALBERT M. BOOZEE,
Clerk of Supreme Court of South Carolina.

87½ [Endorsed:] The State of South Carolina. In the supreme court. John J. McLure, as administrator of the estate of George W. Melton, dec'd, *vs.* Margaret A. Melton and her infant children, Hopkins, Dwight & Co., and others. Supersedeas bond. (Copy.)

88 State of South Carolina Supreme Court.

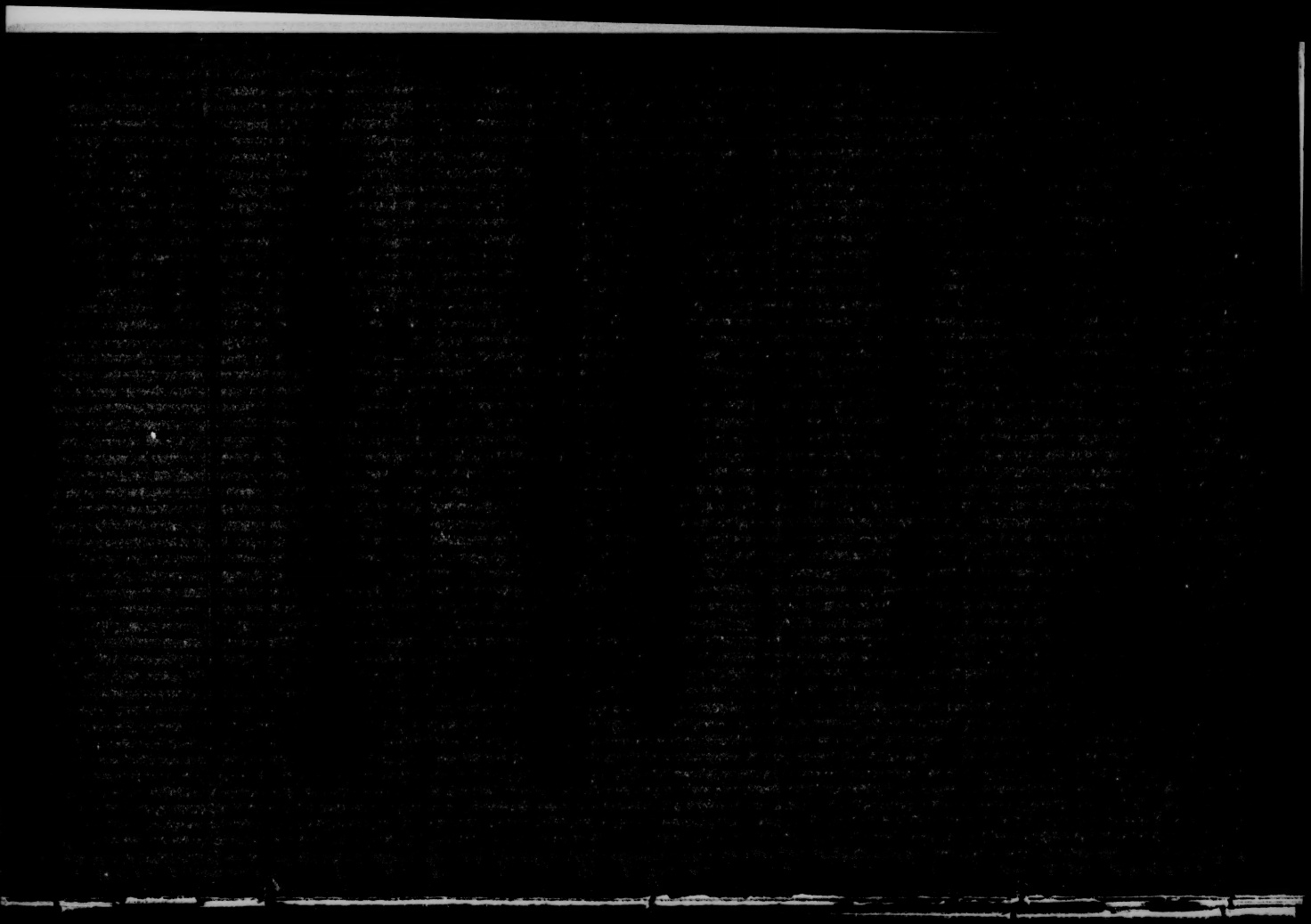
I, Albert M. Boozee, clerk of the supreme court of the State of South Carolina, hereby certify that the foregoing and amended 87 written and printed pages comprise a true and correct copy of the record and proceedings of the supreme court of the State of South Carolina, together with the original writ of error from the Supreme Court of the United States, the original citations, with service thereof, copy of petition for writ of error, and copy of writ of error bond as allowed, making a complete transcript in the case wherein Gustavus C. Hopkins and others, composing the firm of Hopkins, Dwight & Co., and others are plaintiffs in error and John J. McLure, as administrator of the estate of George W. Melton, deceased, and others are defendants in error, as appears by the record and proceedings now on file in my office.

Witness my hand and the seal of the said supreme court of South Carolina this 30th day of September, A. D. 1886.

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk of Supreme Court of South Carolina.

Endorsed on cover: South Carolina supreme court. No. 400. Gustavus C. Hopkins, Charles D. Miller, and Lucius Hopkins Smith, composing the firm of Hopkins, Dwight & Co., successors of Lucius Hopkins & Amos T. Dwight, composing the firm of Hopkins, Dwight & Co., and Lucius H. Smith, trustee, &c., plaintiffs in error, *vs.* John J. McLure, administrator of George W. Melton, deceased, W. H. Kerr, clerk of the court of common pleas of Fairfield county, S. C., *et al.* Filed October 6, 1886.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 126.

HOPKINS, DWIGHT & CO.

vs.

JOHN J. McCLURE ET AL.

In Error to the Supreme Court of the State of South Carolina.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The complaint in this action was filed in the Court of Common Pleas for Chester county, in the State of South Carolina, on the day of July, 1877, by John J. McLure, administrator of the estate of George W. Melton, deceased, for the administration of the estate of the said George W. Melton, who died intestate on the 9th of July, 1876. The defendants in the action were Margaret A. Melton, the widow of the intestate, and her infant children, and the creditors of the intestate, among whom are the plaintiffs in error, Hopkins, Dwight & Co. The plaintiffs in error,

Hopkins, Dwight & Co., are creditors of the intestate's estate by a sealed note, dated May 19, 1876, and secured by a mortgage of land. A balance was still due on the note after the proceeds of the mortgaged land had been applied to the payment of the note. The plaintiff in error, Lucius H. Smith, is trustee of land, charged with an ultimate liability for the satisfaction of this note.

The contention of the plaintiffs in error was that their debt being secured by mortgage, the balance of it unpaid after the exhaustion of the mortgage was entitled to priority of payment in the administration of the general fund of the estate.

The referee decided in favor of the plaintiffs in error, and the cause came on to be heard in the Common Pleas, on exceptions to his report. (Record, p. 25.)

The following decree was rendered by the Court of Common Pleas on May 20, 1885:

"It is therefore adjudged that the *lien of the mortgages referred to in the foregoing opinion having been exhausted they are no longer preferred claims*, and that the debts they were given to secure can only be proved and *take rank against the assets in the hands of the administrator, according to the nature of the instrument evidencing the debt and the statute relating thereto.*

"It is further adjudged that the debt considered here as the mortgage debt held by Hopkins, Dwight & Co., no matter who may own it now, can only resort to the trust estate referred to in this opinion, after it has received all money applicable thereto from the general assets.

"It is further adjudged that the trust created by G. W. Melton is not fraudulent as to any debts existing at the time of the creation of the trust."

The plaintiffs in error appealed from this decree, and filed "exceptions to the decree," in the nature of assignments of error. (Record, p. 34.)

The judgment of the Supreme Court of the State was rendered April 22, 1886, as follows:

"The judgment of the court is that the judgment of the Circuit Court be affirmed."

This case comes before you on a writ of error to the Supreme Court of South Carolina, which is the court of last resort in that State, issued upon the ground "That in said cause was drawn in question the validity of a statute of said State and of a decision of the court of last resort of the said State, on the ground of their being repugnant to the Constitution of the United States; that the decision of said court of last resort was adverse to the right and title claimed" by the plaintiff in error.

The repugnancy which we allege in the statute, and in the decision of the court based thereon, is that it impairs the obligation of a contract made with us by an intestate in his lifetime by changing the order of the distribution of his assets after his death, and after our rights had become fixed and vested. The case, stated chronologically, is as follows:

I. On May 19, 1876, George W. Melton executed a bond and mortgage to Hopkins, Dwight & Co.

II. On July 9, 1876, George W. Melton died.

III. July, 1877, this action was commenced.

IV. December 3, 1877, the said mortgage was foreclosed, and, under the decree, the land was sold. This contest is over the distribution of the estate in court, which represents the realty, and to which the liens are transferred.

V. December 14, 1878, the General Assembly passed "an act to alter and amend the law in relation to the payment of debt of a decedent."

A. This is the act which we say impairs the obligation of our contract; because, by section 26 of the statute of South Carolina of 1789 (5 S. L., 111), enacted and provided that the debts of a decedent should be paid in the order following:

1. Funeral and expenses of last sickness, charges of probate of will, or letters of administration.
2. Debts due to the public.
3. Judgments, mortgages, and executions; the oldest first.
4. Rent.
5. Bonds or other obligations.
6. Debts due on open accounts.

B. In 1872 the statutes were revised, and this provision re-enacted and incorporated in the Revised Statutes (p. 457, chap. XC, sec. 3), as follows:

"The assets which come to the hands of an executor or administrator, after proper allowance to the executor or administrator in a due course of administration, shall be applied to the payment of his debts in the following order," that is to say:

1. Funeral and other expenses of the last sickness, charges of probate, or letters of administration.
2. Debts due to the public.
3. Judgments, mortgages, and executions; the oldest first.
4. Rent.
5. Bonds and debts by specialty.
6. Debts by simple contract.

C. On October 14, 1875 (which was prior to the execution of the mortgage to the plaintiffs in error) the Supreme Court (of last resort) of South Carolina construed the statute of 1789 in the case of Edwards *vs.* Sanders, 6 S. C., 316, as follows:

"Under section 26 of the act of 1789, prescribing the order in which debts of a decedent are to be paid, *mortgages*, whether of chattels or real estate, rank in the third class, and are entitled to payment *out of the general estate* in preference to specialty and simple contract debts."

There the law stood until the passage of the following act on December 14, 1878, as stated above as No. V in the chronological table. This act is the pivot of the case—"an act to *alter* and amend the law in relation to the payment of debts of a decedent,"—the provisions of which were:

"SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same,* That in the administration of the assets of a decedent *mortgages shall not be entitled* to a priority over rents, debts by specialty, or debts by simple contract, except as the particular parts of the estate effected by the liens of such mortgages.

"That after the property covered by the liens is exhausted, the grade of the demand shall be determined by the nature of the instrument which the mortgage was given to secure."

It has been argued that this "statute is merely declaratory." The proposition is absurd. The very *title* is "to *alter* and amend this law."

It makes no reference to what the law is. It merely enacts what it *shall* be.

My first proposition is that the decision of the Supreme Court, conforming with this statute and reversing the case

which construed the former statutes, of necessity rests upon this statute.

Secondly. That in this case the court was bound to have followed the order of distribution as fixed by law at the time the rights vested.

Thirdly. That the first act, as construed by the court of last resort at the time the mortgage was executed, entered into and became a part of that contract, and was the law of the case.

Fourthly. That the decision herein reversing the construction of the statute by the court of last resort in force at the time the contract was made, and at the time the rights vested, impairs the obligations of the contract.

Fifthly. If there had been no act passed in 1878, and the decision herein had merely reversed the decision, construing the act of 1789, in force at the time the contract was made, it would impair the obligation of the contract.

Sixthly. If the act of 1878 were in terms declaratory merely, the construction of the court of last resort of the statute in force where the contract was made, and at the time of the death, being part of the contract, and constituting the rule of distribution at the time of the death, would be a contract impaired by a decision changing either. But the first proposition is conclusive as to *this* case.

There can be no doubt that at the time this mortgage was made (May 19, 1876,) mortgages had, in the distribution of decedents' estates, precedence of both specialty and simple contract debts. So read the *statute* law of the State. Thus was it construed by the court of last resort.

This law was unchanged when Major Melton died, July 9, 1876.

The rights of plaintiff in error to have the decedent's estate distributed according to the law then of force becomes vested at the date of the death. "As the tree falls,

so it lies." It is observed in Cooley on Constitutional Limitations, 360, "expectation is not property, but on the death of an ancestor rights or property become *vested.*"

It is laid down in 3 Wait's Actions and Defences, p. 254, (citing McClintock's Appeal, 29 Penn. St., 360):

"The right which a creditor has to his just proportion of the property which the deceased debtor dies possessed of, *vests at the instant of his death;* and the *law commits* it to the care of the personal representative upon an *express trust* to pay each creditor his due."

Such, also, was the law of South Carolina:

"The assets of a deceased debtor are distributed among his creditors with reference to the rank of their demands *at the time of his death.*"

Tucker *vs.* Condy, 6 Rich., Eq., 281.

"From this time forward, so completely are these effects appropriated, in the eye of the law, to the satisfaction of the decedent's debts, that any unauthorized meddling with them is trespass, for which the wrong-doer is liable to the creditor, as a party injured; and if the interference be by one duly authorized as executor or administrator, he becomes immediately responsible to the extent of the assets in his hands. *These rights vest in the creditor immediately upon the death of the debtor.*"

Morton and Courtney *vs.* Caldwell, 3 Strob. Eq., 164.

Now, then, it is clear by the statute law of the State as declared by its highest court, this mortgage was entitled to precedence when made, and that precedence continued to the time of the death of the maker; and that this right of precedence then became vested.

My next proposition is that the law as it stood entered into and became a part of the contract, and that to divest

that right was to impair the obligation of the contract. This proposition is so well settled that authorities are not needed to support it, but in Bronson *vs.* Kinzie (1 How., 319) the court says:

"They were the laws of the State at the time, and therefore entered into the contract and formed a part of it, without any express stipulations to the effect in the deed."

And in McCracken *vs.* Hayward, 2 How., 612:

"This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them, as the measure of the obligation to perform them by the one party and the right acquired by the other."

Then the law which was in force at the time the contract was made, and which entered into and became a part of that contract, continued in force until the right of precedence it gave became vested by the death. After that a *statute* was enacted "to *alter* and amend" that law, to divest that right and take away that precedence; and yet we are told that this statute "to *alter* and amend" does not impair the obligation of that contract.

And yet it has been gravely and earnestly argued in this case that, "if the court below had held the statute to be void, the decree would have been the same." That is a legal paradox. Suppose, however, for the purposes of argument merely, that the act of 1878 had not been enacted, and that the court had rendered the same decision which it has, the obligation of the contract would none the less have been thereby impaired. The inhibition of the Constitution is that no State shall pass any law impairing the obligation of contracts. It is wholly immaterial whether the act emanates from the court, the legis-

lature, or a sovereign convention. The essence of the Constitutional provision is the thing inhibited, to wit, "impairing the obligation of a contract."

What the power in the State is that does it, *that* is the power which is forbidden to do it.

"The National Constitution forbids the State to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably, *no more by judicial decisions* than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective States, we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the will and statutory policy of the framers of the Constitution, in providing for the creation of an independent Federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery."

Pine Grove *vs.* Talcott, 19 Wall., 678.

In the case of the county of Livingston *vs.* Darlington (101 U. S., 415), on an issue similar to that here presented this court measured the validity of the bonds in question by the decision of that tribunal rendered prior and unmodified at the date of their issue.

In Douglass *vs.* County of Pike (101 U. S., 677), this court reviews a number of cases as to its duty in relation to retroactive decisions which impair the obligation of contracts, and, after special consideration of the opinion of Chief-Justice Taney in Rowan *vs.* Ruggles, then says (on p. 687):

"The true rule is to give to a *change of judicial construction*, in respect to a statute, *the same effect* in its operation on contracts, and existing contract rights, that would be given *to a legislative amendment*; that is to say, make it prospective and not retroactive. After a statute has been settled by judicial construction, *the construction becomes*, so

far as contract rights acquired under it are concerned, *as much a part of the statute as the text* itself, and a *change of decision* is to all intents and purposes *the same in its effects* on contracts as an amendment by means of *legislative enactment.*"

In the same connection, speaking of changes of decision by State courts, this court says:

"Ordinarily we follow them, *except* so far as they affect rights vested before the change was made."

See also, Taylor *vs.* Ypsilanti, 105 U. S., 60.
Louisiana *vs.* Pilsbury, 105 U. S., 278.

This is decisive of the case at bar. Edwards *vs.* Sanders construed the statutes on the subject then of force, which was the act of 1789, carried into the revised statutes of the State in 1872. That decision was "the judicial construction" and the law of the case when the mortgage was made (and consequently entered into the contract), when the decedent died (and the rights became fixed) and when the mortgage was foreclosed, and this construction is "as much a part of the statute as the text itself." The rest of the sentence is equally applicable to the decision of the learned circuit judge, which was affirmed by the Supreme Court: "A change of decision is, to all intents, the same in its effects on contracts as an amendment by means of legislative enactment."

It was argued on the motion to dismiss this writ of error that the same decision would have been made if the act of 1878 had not been enacted. In view of the decision of this court that suggestion may be accepted as correct and true without in anywise impairing the strength of our case.

I entertain great admiration and respect for the judge who made this decree and for the court which affirmed

it personally and officially. It is a very strong court. But this decision would never have been made, or, if made, affirmed, had not this statute been enacted.

Why should they they have rendered it without the act when Edwards *vs.* Sanders was strictly in accord with the statute law as it stood at the time of its rendition?

The construction of the act of 1789, in Edwards *vs.* Sanders, had become a rule of property such as a court, on well-established principles, has no right to disturb, and that court was not at all likely to have disturbed it had not this statute intervened. Nor are we complaining that the court followed the statute, except in this, that the statute was not applicable to our case. Our rights had attached under the act of 1789, as construed in Sanders *vs.* Edwards, and our rights being vested could not be divested by either the act of 1878 or the court without impairing the obligation of the contract in which they vested.

It has been argued that the Supreme Court would have disregarded the express provisions of the law of 1789, which had really been re-enacted by its incorporation in the revision adopted by the statute in 1872, and also reversed its own decision, construing this statute according to its terms, even if the law of 1878 altering it had not been enacted. The reason for saying so is that, in Piester *vs.* Piester, it is said "the statute (of 1878) is merely declaratory."

With the statutes before us, it is impossible to believe that this decision could have been made without the statute of 1878.

It is a reflection upon the Supreme Court of South Carolina to say that it would have gone in the teeth of the statute, reversing its own construction thereof, unless the legislature had enacted this statute to alter the law.

Unquestionably, "by fair implication," this statute entered into and was the basis of the decision.

Now, that is just what is required, and is all that is required.

Let us look at those of your decisions in which this point is expressly considered, and not to such cases as relate incidentally, merely, to the general subject.

In Kennebec R. R. *vs.* Portland R. R. (14 Wall., 23), the Federal question relied upon was a change of the law of foreclosure after execution of the mortgage, which, it was alleged, impaired the obligation of the contract. The court said that the Federal question must appear from the pleadings, or the decree or any other proceedings in the case, other than the opinion; but in that case by agreement the opinion was made part of the record, and that showed conclusively that the State court had held that "the foreclosure was valid without reference to the statute of 1857."

In Boughton *vs.* Exchange Bank (104 U. S., 427), the court says: "The record must show affirmatively, or by *fair implication*, that some Federal question was involved which was necessary to the determination of the cause."

In the case at bar the record shows not merely "by fair implication," but clearly and unquestionably that the decree of the Circuit Court, which was affirmed by the Supreme Court of South Carolina, could not have been rendered without reversing the unquestioned statute law of the State which was in force at the time the contract was made, at the time of the death, and at the time of the foreclosure—statute law not only unquestioned, but as then construed by the State court of last resort. In the Bridge Proprietors *vs.* Hoboken Co. (1 Wall., 142), the

court reaffirmed the four propositions or canons of construction as to the twenty-fifth section of the Judiciary act, which were laid down by Mr. Justice Story in Crowell *vs.* Randell (10 Peters), and the third of those propositions is so peculiarly applicable in this connection that I may be excused for quoting it in full:

"That it is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms, *ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced that judgment."

Now, then, apply this proposition to a few facts in this case. In the decree of the State Circuit Court it is expressly held that by the case of Edwards *vs.* Sanders (6 S. C.), construing the acts of 1789 and 1872, and filed October 14, 1875, it was held that after a specific lien of a mortgage had been exhausted by foreclosure and sale, the mortgage *still took amongst judgments and executions as a mortgage*, and this *without reference to the nature* of the instrument by which the debt was evidenced. *When* this case stood as the declared rule of the construction of the statute, the referee held that the mortgages set up in this case were *preferred claims as such*. Before this case came on to be heard upon the exceptions to the referee's report, the case of Piester *vs.* Piester, Mss., was filed, which reversed the rule as laid down in Edwards *vs.* Sanders. Right here is the fallacy of defendant in error. He relies upon the opinion that if the court had held the statute [that is, the subsequent statute] to be void, the decree would have been the same.

This is to assume that the Supreme Court of South Carolina would have decided diametrically against the

plain terms of the acts of 1789 and 1872, *as construed by themselves* in Edwards *vs.* Sanders, fixing the law at the time our mortgage was taken, when the mortgagee died, and when it was foreclosed, and when this action was brought, without any statute "to *alter* and amend the law." I will not reflect upon that court by accepting any such statement, though I am seeking to reverse its judgment.

The point can not be escaped that the act of 1878 impairs the obligation of this contract; that the decision could not have been rendered without this act "to *alter* and amend the law;" and that it appears "by clear and necessary intendment that this question must have been raised, and must have been decided in order to have induced the judgment" rendered in this case by the Supreme Court of South Carolina.

WM. E. EARLE,
Attorney for Plaintiff in Error.

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HOPKINS, DWIGHT & CO.

vs.

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In Error to the Supreme Court of the State of South Carolina.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

On the oral argument of this case, Mr. Hemphill, for defendants in error, was allowed to file a brief, and attorney for plaintiffs in error was allowed a day after service of a copy in which to file a brief in reply. The brief was served this 23d of November.

There is no material difference in the statement of facts, except that defendant in error says:

"The controversy has arisen upon the construction of the act of 1789, providing for the distribution of decedents

estates; but this court has only to decide whether the obligation of the contract between Melton and Hopkins, Dwight & Co., has been violated by the decision of the Supreme Court of South Carolina in this case."

This is correct, if it be added "by following the order of distribution made by the act of 1878, instead of that of 1789, which was in force when the contract was made, when the rights were vested by the death of the mortgagor, and when the mortgage was foreclosed."

The act of 1789 was never changed or repealed until 1878. It was re-enacted by being incorporated in the Revised Statutes of 1872. The order of distribution in the act of 1789, and that in the Revision, are given on page 4 of my brief in chief.

Unquestionably there are conflicting constructions of the act of 1789. But the statute is very simple and speaks for itself, and that statute covered the origin of this case, and the vesting of the rights under it, and should have controlled the distribution of the assets, instead of another statute passed in 1878, after the mortgage had been foreclosed, but before the assets had been distributed.

It is the statutes of the State which make *the law*, even if never "accepted by the profession *as law*."

From the brief for defendants in error and the record in the case we might infer "that the Legislature hastened to rectify" the rule of distribution to suit this particular case. Certainly the hurrying referred to was not to affect the decision of the Supreme Court in Edwards *vs.* Sanders, for that was made in 1875, and the act "to rectify" was not enacted until December, 1878—over three years.

It is true that prior to the decision of Edwards *vs.* Sanders the Supreme Court made two decisions adopting an order of distribution different from the act of 1789, but the statute is plain enough, and it is equally plain

that Edwards *vs.* Sanders *construed it correctly.* It is true that in Piester *vs.* Piester the court adopted the same order of distribution as in the case at bar, but that *was after* the passage of the act of 1878, and, like the case at bar, must have been based upon the statute of 1878. There is nothing in the language of either decision to warrant the statement that either decision would have been made had not the act of 1878 been enacted.

The legal presumption clearly is that they would not have been. But suppose the act of 1878 had never been passed, then clearly upon the decisions of this court, cited on pages 9 and 10 of my brief in chief, the decision would have impaired the obligation of the contract.

There is certainly no force or applicability in what is said by the defendant in error, as to the debts due to Samuel D. Melton and A. P. Wylie, for *their status was fixed by the act of 1789.* They were made with reference to that act, and it entered into and became a part of their contract just as it did into ours. The fallacy is in the supposition that the decision in Edwards *vs.* Sanders *made* the law. The act of 1789 constituted *the law*; the decision of the court construed it merely; and the decision in Edwards *vs.* Sanders simply construed it correctly and as it is written.

It may be that Edwards *vs.* Sanders "was a surprise to the profession—was never accepted as the proper construction;" but this court will be much surprised at this fact when it reads the act of 1789 and Edwards *vs.* Sanders in connection.

So, also, will it be surprised on reading the act of 1878, that it should be said that it "seems to be somewhat in the nature of a *declaratory* law."

On page 6, of the brief of the defendant in error, it is said that:

"The judgment in this last case was made because the court was unable to see how the occurrence of the death of the mortgagor, Melton, could so increase the dimensions of a mortgage as not only to cover the property specifically described in it; but in addition the whole of his estate, real, personal, and mixed, which was not even referred to remotely, and also because the court was unable to see why an instrument which gave no power to foreclose against any but certain specified property during the lifetime of the mortgager, should be otherwise after his death."

Nevertheless this is just what the act of 1789 practically did.

Under the law of South Carolina, when a decree of foreclosure is made on a mortgage in the lifetime of the mortgagor, it contains a provision that, in case the mortgaged property fails to sell for sufficient to pay the mortgage debt and costs, the mortgagor may have judgment and execution for the balance unpaid. (See sec. 190, Code of S. C., adopted March 1st, 1870.)

This is in strict analogy to the order of distribution of assets of a decedent, as provided for by the act of 1789.

WM. E. EARLE,
Attorney for Plaintiff in Error.

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vs.

JOHN J. McLURE, ADMINISTRATOR, ET AL.

In Error to the Supreme Court of the State of South Carolina.

Brief for certain Defendants in Error, by Jno. J. Hemphill.

Statement.

George W. Melton died in 1876, leaving an estate insufficient to pay his debts, and this controversy has arisen between his creditors over the general assets of his estate left after applying to the mortgage held by Hopkins, Dwight & Co. the amount for which the property sold, which was covered by the lien of their mortgage. Hopkins, Dwight & Co. claim that they have a lien on all of Melton's estate, as well as on that covered by their mortgage, and must first be paid, while the creditors whom I represent, to wit, S. D. Melton, trustee, and A. P. Wylie's

executors, being creditors by special contract under seal, claim priority of payment. The controversy has arisen upon the construction of the act of 1789, providing for the distribution of decedents estates; but this court has only to decide whether the obligation of the contract between Melton and Hopkins, Dwight & Co. has been violated by the decision of the Supreme Court of South Carolina in this case.

Argument.

The plaintiffs in error say that this has been done because, at the date of their contract, the law of the State was settled by the opinion in Sanders *vs.* Edwards, and that they must be presumed to have contracted with reference to that decision. The history of the law in the State on this subject is this: In 1822 the question as to the priority of creditors of a deceased person came up in Tunno *vs.* Happoldt before the court of appeals at law, and it was decided that mortgages had priority only as against the property specifically covered by the mortgage. In 1846 the same question was made before the court of appeals in equity in Kinard *vs.* Young (2 Rich, Eq., 258), and the court, re-affirming Tunno *vs.* Happoldt *et al*, held that "in the assets of an insolvent testator or intestate, mortgages as mortgages are not entitled to priority over rent, specialties, and simple contract debts, except as they are liens on any particular part of the estate. After the lien is exhausted the grade of the demand must be determined by the grade of the instrument which the mortgage was given to secure." That was unquestionably the settled law of the State from 1822 to 1875—53 years, when Edwards *vs.* Sanders was decided. It is the solitary case holding the contrary doctrine; it has no support either preceding or following; it was never accepted by the profession as law, and was so manifestly

unjust and illogical that the Legislature hastened to rectify the wrong, and the Supreme Court, at the first opportunity, to declare that it was not the law of the State.

Though decided in 1875 it was not published until 1877 (Record, p. 39). Surely this court will not hold that this solitary *stray* case, which is without predecessor or successor, became so much a part of the contract of Hopkins, Dwight & Co. with Melton that it must be enforced here notwithstanding the State Supreme Court has decided that it never was the law of the State.

In Piester *vs.* Piester (22 S. C., 145), the court says:

"We are constrained to say that, in our judgment, the case of Edwards *vs.* Sanders is not only unsustained by proper rules of construction, but is in direct opposition to the cases and what was at that time considered the settled law of the State."

And in the opinion in this case (at bar) in discussing Edwards *vs.* Sanders, the court holds that "whatever may be the opinions of individuals as to its correctness, it must be regarded as an erroneous declaration of what was the law and as only the law of the particular case in which it was made." (Record, pp. 39–40.)

And further on the court refuses to assent to the proposition "that the law ever was as it was incorrectly announced in Edwards *vs.* Sanders."

According to my understanding of the rule, this court would not feel warranted in holding that every single decision of a State court becomes so much a part of the contracts made in the State that its principles must be enforced.

The law upon this question, as laid down by the Supreme Court of the United States in the case of the Ohio Insurance and Trust Company *vs.* Debalt (16 How., 432), is:

"That if the contract when made was valid by the laws of the State, as then expounded by *all* the departments of its Government, and *administered in its courts* of justice, its validity and obligation can not be impaired by any subsequent act of the Legislature or decision of its courts."

In Gelpcke *vs.* Dubuque (1 Wall., 206), the above doctrine is applied in favor of the validity of certain bonds issued in aid of a R. R. Co., where the *unbroken current* of decisions in Iowa and sixteen other States had held that acts authorizing the issue of such bonds were constitutional, although the latest decision in Iowa, rendered subsequent to the issue of the bonds in question, had held that such acts were unconstitutional and void. Lee County *vs.* Rogers (7 Wallace, 183), re-affirms Gelpcke *vs.* Dubuque, because the counties of Iowa "were held by the *settled* adjudications of the highest courts of the State to possess full power to issue the bonds;" and in 101 U. S., p. 677, which is relied on by plaintiffs, the court says: "After a statute has been *settled* by judicial construction," this becomes a part of the statute, etc.

From these decisions it seems that the *rule* of law is, that where the long current of decisions has been one way, and has thus "been expounded by all the departments of the Government," and contracts are made in view of such construction, the change of such construction that would alter the *validity or obligation* of such contract would not be permitted.

The doctrine in Edwards *vs.* Sanders (6 S. C., p, 316), so far from being in accord with the current of decisions in this State was an entirely new construction of a Statute, was a surprise to the profession, was never accepted as the proper construction. Hence, we submit that this case was not accepted as embodying the *settled* law of the State, and it can not fairly be held that contracts were made in reliance upon it. It will rather be regarded as

one of the "oscillations" of that court. And as in Gelpcke *vs.* Dubuque (1 Wall., 205), the court says: "It can not be expected that this court will follow every such oscillation, from whatever cause arising," so we submit this court can't undertake to enforce contracts in accordance with the peculiar doctrine of every case decided.

We do not think the appellants' position a tenable one, but if this court should hold that the enforcement of the doctrine laid down in Piester *vs.* Piester would violate the obligation of the contract contained in the mortgage of Hopkins, then we submit that the enforcement of the principle in Edwards *vs.* Sanders would be a violation of the obligation of the contracts we represent here. The latter case was decided in 1875. The debts to Samuel D. Melton and Wylie, which we represent, are dated February 1, 1871, and May 3, 1872. At that time, the law as set forth in Tunno *vs.* Happoldt (2 McC., 188), and Kinard *vs.* Young (2 Rich. Eq., 258), was the *settled* law of the State, and whatever may be the effect of Edwards *vs.* Sanders as to subsequent, it can not affect past transactions so as to violate our contract.

The plaintiffs in error lay great stress on the act of 1878 and say that it is the pivot of the case.

It will be noticed that the decision in Peister *vs.* Peister is not based on the act at all, and is wholly independent of it. In referring to it the court says:

"But the act seems to be somewhat in the nature of a declaratory law. * * * But, whether that is so or not, in our judgment, the act only declared what has been the law of this State since 1789."

Plaintiffs further say that the court could not have rendered the decision in Peister's case without founding it on the statute of 1878. The answer is that they did do so. But if an act of the Legislature was not necessary

as a basis for the very peculiar decision in Sanders *vs.* Edwards it was hardly essential to the very righteous one in Peister *vs.* Peister.

The judgment in this last case was made because the court was unable to see how the occurrence of the death of the mortgagor, Melton, could so increase the dimensions of a mortgage as not only to cover the property specifically described in it, but in addition the whole of his estate, real, personal, and mixed, which was not even referred to remotely, and also because the court was unable to see why an instrument which gave no power to foreclose against any but certain specified property during the lifetime of the mortgagor should be otherwise after his death.

The plaintiffs also raise the question of vested rights, but that is a matter of which this court in this case will not take cognizance; and, if it did, I can add nothing to the very clear views expressed by the State Supreme Court, and found in Record, p. 42.

JNO. J. HEMPHILL,
Attorney for Defendants in Error.

Office Supreme Court, U. S.
FILED
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JAMES H. MCKENNEY
CLERK

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term 1886.

GUSTAVUS C. HOPKINS *et al.*, Plaintiffs in Error,
vs.
W. GILL WYLIE *et al.*, Defendants in Error.

1081.

Error to the Supreme Court of the State of South Carolina.

Now come the defendants in error, by James Lowndes, their attorney, and move to dismiss the writ of error in the above-entitled cause on the following grounds:

I. That the original citation does not accompany the transcript of the record.

II. That there are in the record no assignment of errors and no prayer for reversal.

III. That the decree sought to be reversed below was not a final decree.

IV. That as the record does not present a Federal question, this court has not jurisdiction.

The defendants in error also move by their said attorney to affirm the decree below, on the ground that the said decree is based entirely on a non-Federal question.

Statement of the Case.

The complaint in this action was filed in the Court of Common Pleas for Chester County in the State of South Carolina on the day of July, 1877, by John J. McLure, administrator of the estate of George W. Melton, deceased, for the administration of the estate of the said George W. Melton, who died intestate on the 9th of July, 1876. The defendants in the action were Margaret A. Melton, the widow of the intestate, and her infant children, and the creditors of the intestate, among whom are the plaintiffs in error, Hopkins, Dwight & Co. The plaintiffs in error, Hopkins, Dwight & Co., are creditors of the intestate's estate by a sealed note, dated May 19th, 1876, and secured by a mortgage of land. A balance was still due on the note after the proceeds of the mortgaged land had been applied to the payment of the note. The plaintiff in error Lucius H. Smith is trustee of land, charged with an ultimate liability for the satisfaction of this note.

The contention of the plaintiffs in error was that their debt being secured by mortgage, the balance of it unpaid after the exhaustion of the mortgage was entitled to priority of payment in the administration of the general fund of the estate.

The referee decided in favor of the plaintiffs in error, and the cause came on to be heard in the Common Pleas, on exceptions to his report. The controversy is thus stated in the opinion of the judge of that court:

"Is the debt and mortgage of Hopkins, Dwight & Co. a preferred claim after its specific line has been exhausted, because it is a mortgage?"

"The act of 1789, 2 Stats., p. 3, has been much discussed by our courts in so far as it relates to the order of payment of the debts of a decedent. The case of Tunno *v.* Happoldt, 2 McC., 188, followed by the case of Kinard *v.* Young, 2 Rich. Eq., 258, in construing the language of

that act, decides that a mortgage is a preferred claim only so far as it is a lien upon specific property, and when that lien is exhausted the debt secured by it took rank according to the instrument by which it was evidenced. As thus declared, the law stood until October 14th, 1875, when the case of Edwards *v.* Sanders was filed, which announced a different rule, as derived from the act of 1789, which had at that time been incorporated in the Revised Statutes of 1872. By this latter case it was held that after a specific lien of a judgment had been exhausted by foreclosure and sale, the mortgage still took rank amongst judgments and executions as a mortgage, and this without any reference to the nature of the instrument by which the debt was evidenced. When this case stood as the declared rule of the construction of the statute, the referee held that the mortgages set up in this case were preferred claims as such. Before this case came on to be heard upon the exceptions to the referee's report, the case of Piester *v.* Piester, Mss., was filed, which reverses the rule as laid down in Edwards *v.* Sanders and re-establishes the rule as declared in Tunno *v.* Happoldt and Kinard *v.* Young, *supra.* Of course the mortgages in this case, then, are not preferred claims, as such, unless there is some reason why they are not under the operation of Piester *v.* Piester. Counsel accordingly argue that the mortgages here are not under the operation of this latter case, but are to be governed by the rule as stated in the case of Edwards *v.* Sanders, because that was the declared rule by the court of last resort, while their mortgages were in existence, and rely upon the case of Herndon *v.* Moore, and the cases there cited, to support this position. (18 S. C., 339.)"

The following decree was rendered by the Court of Common Pleas on March 20th, 1885:

"It is therefore adjudged that the lien of the mortgages referred to in the foregoing opinion having been exhausted they are no longer preferred claims, and that the debts they were given to secure can only be proved and take rank against the assets in the hands of the administrator, according to the nature of the instrument evidencing the debt and the statute relating thereto.

"It is further adjudged that the debt considered here

as the mortgage debt held by Hopkins, Dwight & Co., no matter who may own it now, can only resort to the trust estate referred to in this opinion, after it has received all money applicable thereto from the general assets.

"It is further adjudged that the trust created by G. W. Melton is not fraudulent as to any debts existing at the time of the creation of the trust."

The plaintiffs in error appealed from this decree, and filed "Exceptions to the Decree," in the nature of assignments of error, as follows:

"*IV. For that his Honor, the presiding judge, held that there was no proof that the said note and mortgage were executed by the parties with reference to the decision of Edwards v. Sanders; whereas he should have held that the parties were to be presumed to have contracted with reference to the law as expounded by our highest court at that time.*

"*V. For that the ruling of his Honor, the presiding judge, that the rank of appellants' claim should be determined by the decision of Piester et al., ex'rs, v. Piester et al., rendered by the Supreme Court, after the execution of the contract, after the death of the deceased, after the commencement of this action, and after the referee's decision upon this claim, was giving said decision of Piester et al., ex'rs, v. Piester et al. a force and effect in violation of Sec. 10, Art. I, of the Constitution of the United States.*

"*VI. For that the decision of the Supreme Court in the case of Piester et al., ex'rs, v. Piester et al., as (or if) applied to appellants' claim, is in violation of Sec. 10, Art. I of the Constitution of the United States.*"

There is nowhere in the record of the proceedings in the Court of Common Pleas anything to show that the validity of a State statute was drawn in question, or that there was a decision in favor of the validity of a State statute.

The judgment of the Supreme Court of the State was rendered April 22, 1886, as follows:

"The judgment of the court is that the judgment of the Circuit Court be affirmed."

There is nothing in the opinion, nor in any other part of the record, to show that in the Supreme Court of the State the validity of a State statute was drawn in question, or that there was a decision in favor of the validity of a State statute.

The writ of error was sued out on May 27th, 1886. The defendant in error Kerr is interested in having the judgment reversed. The original citation does not seem to accompany the record. There is no assignment of errors.

Argument.

The first two grounds of the motion do not call for argument.

The judgment is not final.

The decree of the Common Pleas does not confirm the report of the referee. It does not direct anything to be done. It is merely a declaratory decree on some of the issues in the cause. The rights of the parties are not fixed by it. No process could issue on the decree.

There is no Federal question in the record.

In the petition for the writ it is averred that the validity of a State statute was drawn in question, and that the decision was adverse to the "right and title" claimed by the petitioners, but this allegation is not borne out by the record.

It is also averred in the petition that the "validity of a decision" of the court of last resort of the State was called in question as being repugnant to the Constitution of the United States, and that the decision of the court was adverse to the right and title claimed by the petitioners. It is made clear by the record that the latter point is really that which was raised in the Common Pleas and in the Supreme Court of the State. *As stated by the plaintiffs in*

error in their exception (supra) it was that the determining the rank of their claim by the decision in Piester v. *Piester was giving that decision a force and effect in violation of the Constitution of the United States, and that the said decision as applied to the claim is in violation of the Constitution of the United States.*

The controversy arose in this way: By the act of 1789, (2 Stats., p. 3,) as uniformly construed by the courts in the distribution of a decedent's estate, a creditor holding a mortgage had no preference as to the debt still due him after his mortgage had been applied to it over other creditors of the same class. In Edwards *v.* Sanders, (6 S. C. Rep., 316,) decided October 14th, 1875, it was held that the mortgage creditor had in that respect a preference. In Piester *v.* Piester, (22 S. C. Rep., 139,) decided in April, 1885, the latter case was overruled, and the old rule declared to be the law. The rights of the plaintiffs in error accrued in the period between these two decisions. On that ground they contended that their rights were to be determined by Edwards *v.* Sanders, but the court applied to it the older rule to their disadvantage.

The question so decided was not one which gives this court jurisdiction.

Mitchell *v.* Lenox, 14 Peters, 340.
R. R. Co. *v.* Rock, 4 Wall., 181.
Knox *v.* Exchange Bank, 12 Wall., 382.
Bethel *v.* Demaret, 10 Wall., 537.

It appears from the opinion of the Supreme Court of the State that in 1878 an act was passed re-enacting the law as it had been declared before the decision in Edwards *v.* Sanders. But the validity of this statute was not drawn in question. It is not mentioned in the opinion of the judge of the Common Pleas; it is mentioned, but not discussed nor relied on, in the opinion of the Supreme Court of the State. The decree does not in any way rest on the

statute, but on independent grounds. *If the court had held the statute to be void, the decree would have been the same.* As said in Piester *v.* Piester, the statute is merely declaratory.

It is therefore submitted that this court has not jurisdiction.

But if this court has jurisdiction, the decree should be affirmed, as it rests on a ground entirely independent of the Federal question.

JAMES LOWNDES,
Attorney for Defendants in Error, except Kerr.